

(23,954)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 304.

J. C. HADACHECK, PLAINTIFF IN ERROR,

vs.

C. E. SEBASTIAN, CHIEF OF POLICE OF THE CITY OF
LOS ANGELES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
CALIFORNIA.

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1 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus.

Petition for a Writ of Habeas Corpus.

To the Honorable W. H. Beatty, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The petition of J. C. Hadacheck respectfully shows:

That your petitioner is imprisoned, restrained, detained and confined of his liberty by C. E. Sebastian, Chief of Police of the City of Los Angeles, in the County of Los Angeles, State of California.

That the said imprisonment, restraint, detention and confinement are illegal, and the said illegality thereof consists in this, to wit: that the only pretext or cause of the arrest of your petitioner or of his imprisonment, restraint, detention or confinement is by virtue of a warrant issued out of the police court of the City of Los Angeles upon a complaint filed therein on the 24th day of October, 1912, charging that your said petitioner, J. C. Hadacheck, did, on the 24th day of October, 1912, in the City of Los Angeles, in the County of Los Angeles, State of California, commit a misdemeanor in that he did wilfully and unlawfully conduct, operate and maintain, and cause and permit to be conducted and maintained a brickyard, brick kiln, and establishment and place for the manufacture and burning of brick within that certain portion of the City of Los Angeles bounded and described as follows, to wit: Beginning

2 at the intersection of the westerly boundary line of the City of Los Angeles with the center line of Wilshire Boulevard; thence easterly along the center line of Wilshire Boulevard to the center line of Western Avenue; thence southerly along the center line of Western Avenue to the center line of Washington Street; thence westerly along the center line of Washington Street to the westerly boundary line of the City of Los Angeles; thence northerly following the various courses of the said boundary line to the place of beginning.

That other complaints have been filed in the said police court against your petitioner charging your petitioner with having committed the same offense upon other and different dates, and the prosecuting attorney and the police department, including the chief of police named herein, threaten to arrest this petitioner upon each date upon which the said brickyard is maintained at the location where the same is now situated.

That your petitioner heretofore commenced an action in the Superior Court of the State of California, in and for the said County of Los Angeles, wherein your petitioner sought to obtain an injunction restraining the said City of Los Angeles and its officers from enforcing the pretended ordinance hereinafter set forth, upon the

ground that the said pretended ordinance was and is illegal and void, for the reasons hereinafter set forth; but that the said Superior Court denied the prayer of your petitioner set forth in the complaint in the said action and refused to grant a restraining order or an injunction in the said action.

That unless your Honors grant the prayer of your petitioner herein and unless a decision as to the validity of the pretended ordinance hereinafter mentioned and set forth is speedily obtained from this honorable Court, your petitioner will be harassed with many prosecutions and will be caused great trouble and expense in defending himself against the said prosecutions; that a decision of any court inferior to this honorable Court will not be final
3 and determinative of the questions herein involved, and the said city and its officers will continue to prosecute your petitioner for violating the said pretended ordinance until a final determination as to the validity of the said pretended ordinance is obtained from this honorable court.

That for the reasons herein stated your petitioner makes this application to your Honors for a writ of habeas corpus in order that the rights of your petitioner may be finally and speedily determined, and in order that if the said pretended ordinance shall be held to be illegal and void your petitioner will not be further menaced or harassed or interfered with in the conduct of his business.

Your petitioner further states that at all times subsequent to the 19th day of March, 1902, he has been and now is the owner in fee and in the possession of that certain real property situated in the City of Los Angeles, County of Los Angeles, State of California, and more particularly described as follows, to-wit:

That portion of the 106.875-acre tract in the Rancho Las Cienegas in the County of Los Angeles, State of California, allotted to William Anderes by the decree in partition of said Rancho in case No. 1161 District Court, as shown on the map of said partition recorded in Book "B", page 298 of Judgments of said court, described as follows:

Beginning on the easterly line of said allotment where it is intersected by the south line of Pico Street; thence southerly along said allotment line 1314.1 feet to the north line of the 35-foot strip deeded to E. P. Clark by deed recorded in Book 1186, page 279 of Deeds, records of said county; thence north $63^{\circ} 28'$ west along the north line of said strip 25 feet; thence northerly parallel with said allotment line 100 feet; thence north $68^{\circ} 23'$ west along the north-easterly line of the 100-foot strip deeded to Joseph H. Spires by deed recorded in Book 1213, page 145, of said deed records,

4 275 feet more or less to the westerly line of said allotment; thence northerly along the said westerly line 1150 feet more or less to the south line of Pico street; and thence easterly along said street line 297 feet to the point of beginning; estimated to contain about 8 acres of land.

That the aforesaid tract of land is situated within that certain district described in the said complaint filed in the said police court and described in the pretended ordinance hereinafter set forth.

That there is located upon the aforesaid tract of land an extremely

valuable bed of clay, which said clay is of very great value for the manufacture of brick of a fine quality, and your petitioner alleges that the said real property above described is worth to your petitioner not less than one hundred thousand dollars (\$100,000) per acre, or about eight hundred thousand dollars (\$800,000) for the entire tract, for brickmaking purposes, and that the said real property is of comparatively small value, not to exceed sixty thousand dollars (\$60,000) to your petitioner, or to any other person, for residence purposes, or for any purpose other than the purpose of manufacturing brick as aforesaid; that your petitioner has used the said property at all times subsequent to the said 19th day of March, 1902, and is now using the same, for the purpose of manufacturing brick of a very high grade and that in his said operations thereon he has made excavations to a considerable depth and covering a very large area of the said property, and that on account of the said excavations the said property cannot be utilized by your petitioner, or by any other person, for residence purposes or for any purpose other than that for which the same is now being used.

Your petitioner further alleges that if the said excavations had not been made in the said tract of land, the value of the said real property for residential or other purposes would not be more than one tenth of the value of the same for brickmaking purposes
5 by reason of the fact that the said tract of land contains a bed of extremely valuable clay, as hereinbefore set forth of a kind that can be found only in a very few places in or about the said City of Los Angeles, and of a kind difficult to be found in any location where the same can be utilized for the purpose of the manufacture of brick.

Your petitioner further alleges that he purchased the said real property because of the said valuable bed of clay thereon, and that he purchased the same for the express purpose of manufacturing brick from the said clay situated thereon and for no other purpose, and that he would not have purchased the said land if the said clay had not been situated thereon.

That at the time of the purchase of the said real property by your petitioner as aforesaid, on or about the said 19th day of March, 1902, the said real property was situated outside of the corporate limits or boundaries of the aforesaid City of Los Angeles and distant from any dwellings or other habitations, and your petitioner purchased the said property for the reason that he believed that he would be permitted to utilize the clay upon the said property and would be permitted to manufacture and burn brick thereon without hindrance or molestation of any kind whatsoever; and your petitioner did not expect or believe, nor did other persons owning property adjacent to or in the vicinity of the hereinbefore described real property, expect or believe that the said territory would ever be annexed to the City of Los Angeles or that the operation and maintenance of the said brickyard or the manufacture of brick on the said property would ever be interfered with in any manner by the said city, or by any other public corporation, or in any manner whatsoever.

Your petitioner alleges, as hereinbefore set forth, that the afore-

said real property was purchased by your petitioner for the purpose
of being utilized by him as a brickyard and as a place for
6 the manufacture and burning of brick, and was purchased by
him because of the extremely valuable bed of clay upon the
said property; that since the said real property was purchased by your
petitioner brick in large quantities and of a very fine quality have
been and are now being manufactured thereon from the clay com-
posing the said real property, and that the said brick have been and
are now being used for building purposes in and about the said
City of Los Angeles.

That subsequently to the said 19th day of March, 1902, your
petitioner proceeded to and did erect upon the said real property
brickmaking machinery of modern type and design, and did erect
necessary office and other buildings, together with a boiler-room,
and such other improvements as your petitioner deemed necessary
in the carrying on of a modern brick manufacturing business, and
your petitioner has expended in the aggregate a sum not less than
twenty-five thousand dollars (\$25,000) in making the said improve-
ments and in constructing the said buildings and in purchasing and
in placing upon the said property brickmaking machinery as afore-
said.

Your petitioner further alleges that during the month of October,
1909, at an annexation election held for that purpose, the territory
in which the aforesaid real property is situated was annexed to the
said City of Los Angeles, and that ever since the said month of
October, 1909, the said property has been and now is within the cor-
porate boundaries of the aforesaid city.

That in the month of February, 1910, the city council of the
City of Los Angeles directed the city attorney to prepare and present
a draft of an ordinance prohibiting the maintenance of brickyards
in that portion of the City of Los Angeles described in the pretended
ordinance hereinafter set forth, and that on or about the 22d day of

March, 1910, the said city council of the City of Los Angeles,
7 did adopt a pretended ordinance known as Ordinance No.
19,989 (New Series) which said pretended ordinance is in
words and figures following, to-wit:

"Ordinance No. 19989.

(New Series.)

An Ordinance Prohibiting the Maintenance of Brickyards in a
Certain Portion of the City of Los Angeles.

The Mayor and Council of the City of Los Angeles do ordain as
follows:

SECTION 1. It shall be unlawful for any person, firm or corpora-
tion to establish, conduct, operate or maintain, or to cause or permit
to be established, conducted, operated or maintained, any brickyard
or brick kiln, or any establishment, factory, or place for the manu-
facture or burning of brick, within that certain portion of the City
of Los Angeles bounded and described as follows, to wit:

Beginning at the intersection of the westerly boundary line of the City of Los Angeles with the center line of Wilshire Boulevard; thence easterly along the center line of Wilshire Boulevard to the center line of Western Avenue; thence southerly along the center line of Western Avenue to the center line of Washington Street; thence westerly along the center line of Washington Street to the westerly boundary line of the City of Los Angeles; thence northerly following the various courses of the said boundary line to the place of beginning.

SEC. 2. It shall be unlawful for any person, firm or corporation to conduct, operate or maintain, or to cause or permit to be conducted, operated or maintained, any brickyard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick, established prior to the passage of this ordinance, within that portion of the City of Los Angeles described in Section 1 of this ordinance.

SEC. 3. That any person, firm or corporation violating
any of the provisions of this ordinance shall be deemed guilty
of a misdemeanor, and upon conviction thereof shall be
punishable by a fine of not less than five. (\$5) dollars nor more
than two hundred (\$200) dollars, or by imprisonment in the city
jail for a period of not more than one hundred (100) days, or by
both such fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty
of a separate offense for every day during any portion of which any
violation of any provision of this ordinance is committed, continued
or permitted by such person, firm or corporation, and shall be
punishable therefor as provided by this ordinance.

SEC. 4. The City Clerk shall certify to the passage of this ordinance
and shall cause the same to be published once in The Los Angeles
Daily Journal.

I hereby certify that the foregoing ordinance was adopted by the
Council of the City of Los Angeles at its meeting of March 22, 1910.

H. J. LELANDE,
City Clerk.

I hereby certify that the foregoing ordinance was presented to the
Mayor for his approval and signature March 24, 1910, and was re-
turned by the Mayor with his objections thereto in writing April
2, 1910; and that the said ordinance, together with the Mayor's
said objections thereto, was laid before the Council at its meeting of
April 5, 1910, and that at said meeting said ordinance was readopted
notwithstanding the objections of the Mayor by the following vote:

Ayes: Messrs. Andrews, Betkouski, Gregory, Lusk, O'Brien, Wash-
burn and Williams (7).

Noes: None.

H. J. LELANDE,
City Clerk."

That thereafter, to wit, on the 24th day of March, 1910, the
aforesaid pretended ordinance was presented to the Mayor of
the said city for his approval, but that the said pretended ordinance
was not approved by the said Mayor; but thereafter, to wit, on the

2d day of April, 1910, the said pretended ordinance was vetoed by the Mayor of the said city and was returned by the said Mayor to the said city council with his objections thereto in writing, in words and figures following, to wit:

"I return herewith, without my approval, an ordinance passed by your honorable body March 22, 1910, prohibiting the operation of brickyards in the district bounded by Washington, Wilshire, Western Avenue and the western city limits, for the following reason:

There are in this district, already established, at least two brick-yards. This ordinance goes into effect thirty days from its passage and approval. Where a business, in itself lawful, has been established and a large amount of money invested therein, the owners thereof should be given a reasonable length of time within which they may close up their business or remove the same from the district within which it is proposed to prohibit the conducting of such business. Thirty days would seem to be entirely too short a period in a case of this kind. I would respectfully suggest that your honorable body pass an ordinance along similar lines providing that after a date in the future, to be fixed by said ordinance, the operation of brickyards be prohibited in said district."

That thereafter and on the 5th day of April, 1910, the said pretended ordinance, together with the said objections of the Mayor thereto, was laid before the said city council at its meeting, and the said pretended ordinance was, on the same day, adopted by the said city council, notwithstanding the said objections of the said Mayor;

that thereafter and on the 6th day of April, 1910, the said
10 pretended ordinance was published in the Los Angeles Daily

Journal, a newspaper of general circulation, published in the said city, and thereafter, to wit, on the 5th day of May, 1910, pursuant to the provisions of the city charter of the said City of Los Angeles, the said pretended ordinance became effective, if the same is a valid ordinance, and is now in full force and effect according to its terms, if the same is valid and if the said pretended ordinance is a valid exercise of the police power of the said city; that the said pretended ordinance has not been in any manner repealed or amended.

That attached to this petition is a map of the said City of Los Angeles, which said map is marked "Exhibit A" and is hereby referred to and made a part of this petition; that the district described in the aforesaid pretended ordinance is shown on the said map and the boundaries thereof are delineated by red lines.

That the real property belonging to your petitioner, and herein-before described, is situate within the district described in the aforesaid pretended ordinance wherein the maintenance of a brickyard and the manufacture and burning of brick are declared to be unlawful, and if the aforesaid pretended ordinance is held to be valid and is held to be in force, your petitioner will be compelled to discontinue and abandon entirely his business of manufacturing and burning brick, and your petitioner's said business will be completely destroyed and he will be deprived of his occupation and business and of his said property and of the use of his said prop-

erty; that your petitioner is and will be unable, for the reasons herein stated, to use the said property for any other purpose than that for which the same is now being used; and therefore if the said pretended ordinance is enforced your petitioner will be entirely deprived of his said property and of the use thereof.

Your petitioner further alleges that the business of manufacturing brick must necessarily be conducted and carried on at the place where suitable clay is found and that the clay cannot be transported to and used at a location other than the place at which the same is found; that, as hereinbefore fully set forth, the bed of clay situated upon the premises belonging to your petitioner, and hereinbefore described, is of a particularly fine quality, and clay of as good a quality as that upon your petitioner's said property cannot be found at any other place within the City of Los Angeles where the same can be utilized for the purposes of manufacturing brick; by reason of the facts set forth in this paragraph your petitioner alleges that the aforesaid pretended ordinance is invalid, null and void in that the same amounts to and is a confiscation of the said property of your petitioner, and your petitioner, if the said pretended ordinance is enforced, will be entirely deprived of his said property and of the use thereof, and your petitioner cannot obtain any compensation whatsoever therefor.

That within the district described in the aforesaid pretended ordinance the brickyard belonging to your petitioner and one other brickyard, to wit, a brickyard belonging to Hubbard & Chamberlin Brick Company, are situated, and that there are not and were not at the time of the passage of the said pretended ordinance any brickyards or brick manufacturing plants within the aforesaid district other than that of your petitioner and that of the said Hubbard & Chamberlin Brick Company.

That there is no lawful or just reason for prohibiting the manufacture of brick or the maintenance of a brickyard within the district described in the aforesaid pretended ordinance or at the place where your petitioner's said property is situated; that the maintenance of the said business cannot be, and has not at any time been, and is not in the nature of a nuisance as defined in section

3479 of the Civil Code of the State of California, and cannot 12 be and is not and will not be dangerous or detrimental to the health or to the morals or to the safety or to the peace or to the welfare or to the convenience of any of the inhabitants of the said district or of the said city; that in the maintenance and carrying on of the said brickmaking business your petitioner has always complied and is now complying with all of the laws of the State of California and with all of the regulations and ordinances of the said City of Los Angeles, except the said pretended ordinance hereinbefore set forth, which said pretended ordinance your petitioner claims and alleges to be invalid for the reasons herein set forth, and which said pretended ordinance your petitioner cannot comply with or obey without suffering the entire and complete loss and destruction of his said business as aforesaid, and

without suffering great loss in the value, to wit, practically the entire value of his said real property, for which loss, damage and injury your petitioner has no speedy or adequate or other remedy at law.

That the said brickyard belonging to the petitioner and situated upon the real property hereinbefore described is kept in a clean and sanitary condition, and the said business of the manufacture of brick upon the said premises is at all times so conducted that there is no disturbance of the peace, quiet or enjoyment of any person residing in the community; that there is no danger or menace to the health, safety or comfort of citizens resulting therefrom, nor does the maintenance of your petitioner's said business interfere with the comfortable enjoyment of life or property by or of any person whomsoever; that there are no noises arising from the maintenance or operation of the said business, causing disturbance or discomfort to any person, and no noxious odors arise from the said brick manufacturing plant; that oil is used exclusively in the burning of the brick kilns on the said property; that at

all times while a kiln is being burned the same is entirely
13 covered and enclosed by a metal hood upon the top of which
is attached a smokestack about seventy-five feet in height,
and owing to the situation of the said brickyard and by reason of
the use of the said hood and of the said smokestack an extremely
small amount of smoke is omitted from any kiln while the same
is being burned; that such little smoke as is emitted therefrom
arises through the said smokestack and is dissipated in the air to
such an extent that the same does not disturb the peace, quiet or
enjoyment of any person and is not a nuisance or a menace in any
manner whatsoever. That your petitioner burns at the said brick-
yard about seven kilns of brick between the months of May and
November of each year and during the other months of the year
no brick are burned upon the said property and the said property
is used only for the storage and sale of brick already burned; that
only about five days are consumed in burning each kiln of brick.

Your petitioner further alleges that during the period of more
than seven years during which he conducted and operated the said
brickyard and brick manufacturing plant prior to the annexation
of the said territory to the City of Los Angeles as aforesaid, no
complaints whatsoever were ever made by any person concerning
the said brickyard or the said brick manufacturing plant, or con-
cerning the operation thereof, and that no attempt of any kind
whatsoever was ever made to regulate or to prohibit the operation
of the said plant prior to the annexation of the said territory to
the City of Los Angeles.

Your petitioner further states that the aforesaid City of Los Angeles is a large city and embraces about 107.62 square miles in area and contains many select and beautiful residence sections; that more than seventy-five per cent of the area of the said city is devoted to residence purposes; that the district described in the aforesaid
14 ordinance, within which the manufacture of brick and the
maintenance of brickyards is attempted to be made unlaw-
ful, is small and includes only about three (3) square miles

and is sparsely settled; that the said district contains large tracts of unsubdivided and unoccupied land.

Your petitioner alleges that the boundaries of the aforesaid district were determined upon by the city council of the said city and were fixed in and by the aforesaid pretended ordinance for the sole and specific purpose of prohibiting and suppressing the operation and maintenance of the brick-making business of your petitioner and of the brick-making business of the aforesaid Hubbard & Chamberlin Brick Company, whose place of business is situated in close proximity to your petitioner's said property.

That within the aforesaid city there are and were at the time of the adoption of the aforesaid pretended ordinance by the said city council many other districts in extent equal to, and many in extent greater than that described in the said pretended ordinance, within which other districts the erection, maintenance and operation of brickyards and brick-manufacturing plants were and are detrimental to the inhabitants thereof, to the same extent or to a greater extent than is the maintenance and operation of brickyards and brick-manufacturing plants in the aforesaid district, described in the said pretended ordinance, and that within the said districts there are now, and were at the time of the adoption of the aforesaid pretended ordinance, in existence and operation numerous other brickyards and places where brick were at the said time and are now being manufactured equally as detrimental as or more detrimental than your petitioner's said brickyard to the inhabitants of the said city, and that there is no more reason for the suppression or prohibition of your petitioner's said business than there is or would be for the suppression or prohibition of the business of other persons, firms and corporations carrying on the brick manufacturing business in other portions of the said city, and particularly
15 the brick manufacturing plants mentioned in this petition other than that of your petitioner.

Your petitioner further alleges that a brick manufacturing plant belonging to Southern California Brick Company is situated on the north side of Stephenson avenue, east of Soto street; that a brick manufacturing plant belonging to Los Angeles Brick Company is situated on the southerly side of Seventh street, about one block west of Boyle avenue; that a brick manufacturing plant belonging to Simons Brick Company is situated on the westerly side of Boyle avenue and on the northerly side of Hollenbeck avenue; that a brick manufacturing plant belonging to Standard Brick Company is situated between South Soto street and the Los Angeles River; that all of the aforesaid brick manufacturing plants are in that portion of the said City of Los Angeles commonly known as Boyle Heights; that the aforesaid portion of the city is thickly built up with residences; that in close proximity to the aforesaid brick manufacturing plants are the residences of many hundred people and is situated an orphans' home, in which more than one hundred children are cared for, and also a home for aged people, wherein a large number of people reside; that Hollenbeck Park, a large public park belonging to the said city and devoted to recre-

ation purposes is situated a short distance from the aforesaid brickyards; that the aforesaid portion of the said city adjacent to the said brickyards is improved and is being rapidly and more greatly improved with homes and other improvements; that the said brickyards were established many years prior to the adoption of the said pretended ordinance, and have been continuously operated since their establishment.

That the brick manufacturing plant and business of your petitioner does not create any greater discomfort and is not any more of a nuisance and is not any more detrimental to the property located or to the persons residing in the vicinity thereof than are the heretofore mentioned brick manufacturing plants situated in that portion of the said city known as Boyle Heights to the property located, or to the persons residing in the vicinity of the said last mentioned plants.

Your petitioner further states that on or about the 11th day of October, 1910, a petition signed by several hundred persons residing in the vicinity of the aforesaid brick manufacturing plants that are situated in that portion of the said city known as Boyle Heights, was filed with the city council of the said City of Los Angeles and that the said petition and the said persons signing the same requested that the aforesaid brickyards and brick manufacturing plants be declared to be a public nuisance and a menace to the health of the inhabitants of the said city, and requested that an ordinance be adopted prohibiting the further maintenance and operation of any of the said brick manufacturing plants; that the said petition stated that when the kilns located in the said yards were being burned they expelled and threw off large volumes of smoke, cinders and noxious gases, which settled over a large territory in the vicinity of the said brickyards, and that the said smoke, cinders and noxious gases were injurious to the health and comfort of the residents of the said portion of the said city.

That subsequently the said petition was considered by the city council of the said city and by the legislative committee of the said city council, but that no ordinance or other regulation has ever at any time been adopted or made and that no action of any kind whatsoever has ever at any time been had or taken by the said city council or by the said city, or by any officer, board or commission thereof, for the purpose of suppressing or prohibiting or regulating or in any manner interfering with the operation of the aforesaid 17 brick manufacturing plants in the said portion of the said city known as Boyle Heights, and that the said plants have at all times been operated and are now being operated without hindrance or molestation or regulation of any kind whatsoever by the said city or by any officer, board, commission or employe thereof.

Your petitioner further alleges that the brickyard and brick manufacturing plant belonging to Los Angeles Brick Company is situated near the intersection of Mission Road and Marengo street in the aforesaid city; that in close proximity thereto are situated the residences of a large number of people and very near thereto is also situated the county hospital belonging to and maintained by the

County of Los Angeles, in which hospital several hundred diseased and injured persons are at all times cared for, treated and maintained. That the operation and maintenance of the said brick manufacturing plant is as great a detriment to the persons living in the vicinity thereof and to the persons maintained in the said hospital as the plant maintained by your petitioner is to the persons residing in the vicinity thereof, but that no effort of any kind, either by ordinance or otherwise, has ever at any time been made by the said city of Los Angeles or by any officer, board or commission of the said city to suppress or to prohibit or to regulate the operation and maintenance of the said last mentioned brickyard and brick manufacturing plant.

That situated in the said city of Los Angeles are brickyards and brick manufacturing plants other than those hereinbefore mentioned; that the said other brickyards and brick manufacturing plants are situated in close proximity to residences, and are in all respects as great a detriment to persons living in the vicinity thereof as the plant maintained by your petitioner is to the persons residing in the vicinity thereof, but that no effort of any kind, either 18 by ordinance or otherwise, has ever at any time been made to suppress or to prohibit or to regulate the operation or maintenance of the same.

That all of the other brickyards and brick manufacturing plants mentioned or referred to in this petition, except that of your petitioner and that of the said Hubbard & Chamberlain Brick Company, are in that portion of the said city of Los Angeles which constituted the said city prior to the annexation of the territory aforesaid in October, 1907.

Your petitioner further alleges that your petitioner's said brickyard and brick manufacturing plant are in all respects similar and are operated in a manner in all respects similar to the brickyards and brick manufacturing plants mentioned in this petition other than your petitioner's said brickyard and plant, and that the brick manufacturing plants, and the operation thereof, of other persons, firms and corporations in the said city are not in any way distinguishable from that of your petitioner.

That no ordinance or regulation of any kind whatsoever has ever at any time been adopted by the said city of Los Angeles regulating or attempting to regulate the manufacture of brick or the manner of conducting or operating brickkilns or brickyards or places for the manufacture or burning of brick, and that no attempt has ever been made by the said city of Los Angeles, or by any officer, board or commission thereof, to regulate the same, and no attempt has ever been made by the said city, or by any officer, board or commission thereof, to determine whether or not brickyards or brickkilns or brick manufacturing plants can be conducted or operated without creating or being a nuisance or without creating or being a menace to the peace, health, safety, quiet or enjoyment of persons residing within the said city.

Your petitioner further represents that the said complaint upon which your petitioner is charged does not state a public offense in

this: that the said pretended ordinance hereinbefore set forth is void and invalid and is in violation of the provisions of the constitution of the State of California and of the provisions of the fourteenth amendment of the constitution of the United States, in that it is an attempt on the part of the said city of Los Angeles to make and enforce a law that abridges the privileges and immunities of citizens of the United States in that it attempts to prohibit the establishment, conduct, operation or maintenance of any brickyard or any brickkiln, or any establishment, factory or place for the manufacture or burning of brick within that portion of the said city described in the said pretended ordinance, and that the said business of establishing, conducting, operating and maintaining brickyards, brickkilns and establishments, factories and places for the manufacture and burning of brick is not a nuisance, but is a lawful, useful and necessary occupation and is protected by the provisions of the constitution of the state of California.

Your petitioner further alleges that the said complaint upon which your petitioner is charged does not state a public offense in this: That the said pretended ordinance hereinbefore set forth is void and invalid as against the vested rights acquired by your petitioner prior to the time when the aforesaid real property belonging to your petitioner was brought within the corporate limits of the said City of Los Angeles by annexation proceedings, as aforesaid, and prior to the adoption of the aforesaid pretended ordinance (if the said pretended ordinance shall be held to be a valid ordinance), by the purchase by your petitioner of the property hereinbefore described at a place where it was lawful at the time of the said purchase to establish, conduct, operate and maintain brickyards and brickkilns, and establishments, factories and places for the manufacture and burning of brick, and by the work performed by your petitioner and on his behalf upon the premises aforesaid, and by the expenditure by your petitioner of large sums of money, as hereinbefore set forth, in the purchase, erection and construction of his said brick-making machinery, buildings, boiler-room and other improvements; and by reason of the premises aforesaid the said ordinance is in violation of the fourteenth amendment of the constitution of the United States prohibiting any state from making or enforcing any law abridging the privileges or immunities of any citizen of the United States or depriving any person of liberty or property without due process of law.

Your petitioner further alleges that the said pretended ordinance hereinbefore set forth is invalid, null and void, and is in violation of the fourteenth amendment of the constitution of the United States in this: that it attempts to abridge the privileges and immunities of your said petitioner, who is a citizen of the United States, in that it purports to prevent the establishment, conduct, operation or maintenance of brickyards, brickkilns, and establishments, factories or places for the manufacture and burning of brick, and does not seek or purport to regulate or control the manner or method in which such brickyards or brickkilns, or establishments, factories or places for the manufacture or burning of brick may or shall be

erected, maintained, conducted or operated, and in that the said pretended ordinance purports to prohibit the establishment, 21 conduct, operation or maintenance of brickyards and brickkilns, and establishments, factories and places for the manufacture and burning of brick, and does not seek, or purport to regulate the manner in which brickyards or brickkilns may or shall be conducted, maintained or operated, or the manner in which brick may or shall be manufactured or burned.

That the said pretended ordinance is in violation of the said fourteenth amendment of the constitution of the United States in that the same is an attempt upon the part of the said City of Los Angeles to make and enforce a law that abridges the privileges and immunities of citizens of the United States, and particularly of your petitioner, who is a citizen, as aforesaid, in that the said ordinance attempts to prohibit the establishment, conduct, operation or maintenance of brick yards and brickkilns, and establishments, factories and places for the manufacture and burning of brick within the aforesaid district, and that the said business aforesaid is not a nuisance but is a lawful, useful and necessary occupation and is protected by the provisions of the constitution of the State of California.

That the aforesaid pretended ordinance is void and invalid and is in violation of the provisions of the constitution of the United States as against your petitioner and as against any other person employed by or in behalf of your petitioner in the establishment, conduct, operation or maintenance of the brickyard and brick manufacturing plant upon the premises belonging to your petitioner, and hereinbefore described, in that the same is in violation of the several rights acquired by your petitioner prior to the date of 22 the annexation of the aforesaid territory to the City of Los Angeles and prior to the adoption of the aforesaid pretended ordinance.

Your petitioner further alleges that the said pretended ordinance is void and invalid and is in violation of the provisions of the constitution of the State of California, and of the constitution of the United States in that the same is unreasonable and, if the same is enforced, fosters and will foster a monopoly and protects and will protect persons, firms and corporations engaged in a like business to that engaged in by your petitioner in the enjoyment of the monopoly of the business of manufacturing brick in the said city, and discriminates and will discriminate against your petitioner, and prevents and will prevent your petitioner from conducting, operating and maintaining his said brickyard and brick manufacturing plant, and prevents and will prevent your petitioner from entering into competition with the other persons, firms and corporations named in this petition who are engaged in the same business as your petitioner, as herein alleged.

Your petitioner further alleges and claims that by reason and by virtue of the purchase of the real property belonging to him as aforesaid, and by reason and by virtue of the establishment, operation and maintenance of his said brickyard and brick manufacturing plant thereon, at a place and at a time when it was lawful so to do and not contrary to the provisions of any ordinance or of any pre-

tended ordinance of the said city, and by reason and by virtue of the expenditure by your petitioner of large sums of money expended by him in and about the said business as hereinbefore set forth, he has the right to continue the conduct, operation and maintenance of his said brickyard and brick manufacturing plant upon the premises so purchased and owned by him as aforesaid and hereinbefore described, and has the right to continue to possess the aforesaid property and the rights so acquired as aforesaid, without hindrance, opposition or interference from or by the aforesaid City of Los Angeles or from or by any of its officers, agents or employees; but your petitioner avers that the officers of the said City of Los Angeles threaten that by virtue of the aforesaid pretended ordinance, they will continue to arrest and fine and imprison your petitioner daily as long as he shall engage in the aforesaid business upon the aforesaid premises.

Your petitioner further alleges that the aforesaid pretended ordinance is void and invalid and is in violation of the provisions of the constitution of the State of California and of the fourteenth amendment of the constitution of the United States, in that the same is unreasonable and in that the enforcement thereof by the City of Los Angeles, and by the authorities thereof, fosters and will foster a monopoly in the manufacture of brick in the said city and discriminates and will discriminate against your petitioner, and prevents and will prevent your petitioner from conducting, operating and maintaining his said brickyard and brickkiln, in his said establishment, factory and place for the manufacture and burning of brick, and prevents and will prevent your petitioner from entering into competition with the other manufacturers of brick named in this petition, and that the said pretended ordinance is and can be enforced and is and can be made to operate and is directed and is meant to be directed only against your petitioner herein and against no other person, firm or corporation whatsoever.

Your petitioner further alleges that in the sale of the brick manufactured by him upon his said premises hereinbefore described and in the operation of his said brick manufacturing plant, he enters into direct competition with each and every of the owners of those certain brick manufacturing plants mentioned in this petition, other than the plant owned by your petitioner.

Your petitioner further alleges that the boundaries of the aforesaid district described in the said pretended ordinance are not determined by any natural or geographical lines or objects, and are not determined with regard to the conditions of the population or inhabitants of the said City of Los Angeles, nor as to whether the said district, or any other portion of the said city is densely or sparsely settled and populated, nor as to any other conditions existing in or about the aforesaid district or in or about any other portion of the said city.

Your petitioner further alleges that the business carried on by your petitioner upon his said premises is a lawful, useful and necessary business; that none of the materials used or manufactured on the said premises by your petitioner are combustible, and that there is no risk or danger from fire; that all of the machinery now in place

therein or hereafter to be placed therein is and will be of the most approved pattern and in accordance with the latest and best devices and improvements known in the manufacture of brick; that the said business of your petitioner can be and will be operated and maintained by him by the use of the said devices and improvements and the said machinery contained therein so that the business and the said plant will not create or be a nuisance and will not interfere in any manner whatsoever with the peace, health, safety, comfort, convenience or welfare of the inhabitants of the said district or of any other portion of the said city.

25 Your petitioner further alleges that the aforesaid pretended ordinance is invalid, null and void in this, that the business of manufacturing, burning and selling brick is not a nuisance per se, as defined by the statutes of the State of California, or at all, nor is the said business of your petitioner carried on or operated in such a manner as to create or to be a nuisance in any respect or in such manner as to be dangerous to the peace, health, safety, comfort, convenience or welfare of the persons residing in said district, or in any other portion of the said City of Los Angeles; that the said pretended ordinance attempts arbitrarily to create a so-called residence district and to prohibit therein the carrying on of a proper and a lawful business, and to prevent property owners therein from making a lawful use of their property, and particularly to prevent your petitioner from making a lawful use of his said property, thereby making an unwarranted and unlawful discrimination against owners of property in the said district and denying to them the use of their property for lawful purposes, and particularly thereby making an unwarranted and unlawful discrimination against your petitioner and denying to him the use of his said property for a lawful purpose; that the said pretended ordinance denies to your petitioner and to other property owners in the said district the lawful use of his and their property, in violation of the provisions of the constitution of the State of California and of the constitution of the United States; that the said pretended ordinance is an unlawful exercise by the said City of Los Angeles of its police powers; that there is no just or inherent reason for prohibiting the manufacture of brick for the maintenance of a brickyard in the district described in the said pretended ordinance while at the same time permitting the manufacture of brick and the maintenance of brickyards in other sections of the city, and particularly in those portions of the said city hereinbefore referred to wherein other brick manufacturing plants and

26 brickyards are permitted to be maintained; that the aforesaid pretended ordinance attempts to prohibit within the said district the prosecution of a lawful business and does not purport to regulate in any manner the conduct of any business.

That the said pretended ordinance amounts to and is an oppressive, unreasonable and unjust interference with and invasion of the use of private property by your petitioner for a lawful purpose, in that the said business of the manufacture of brick carried on by your petitioner on the property hereinbefore described is a lawful, useful and necessary business, and that the enforcement of the

said pretended ordinance will entirely suppress the said business and will prohibit your petitioner from conducting the same, as is more fully hereinbefore set forth.

That the provisions of the said pretended ordinance are unnecessary for the preservation of the public peace, health, safety, morals, welfare, and convenience, or of any thereof, in that the said brickyard and the said brick manufacturing business are not a menace to or an interference with the peace, health, safety, morals, welfare or convenience of the public or of any portion thereof or of any person or persons residing in the said City of Los Angeles.

That the said pretended ordinance does not have uniform operation as to all the classes upon which it purports to operate, in that the said pretended ordinance operates and has at all times operated only as against your petitioner and the said Hubbard & Chamberlain Brick Company, and the business carried on by them, and not as against any of the other brick manufacturers named in this petition, or as against the business carried on by the latter, or any of them.

That the said pretended ordinance attempts to provide and enforce restrictions and prohibitions against your petitioner and his
said business that are not provided and do not exist by
27 virtue of any law of the State of California or of any ordinance
of the said City of Los Angeles with respect to other businesses that are in all respects similar and similarly situated to that of your petitioner, which restrictions and prohibitions are not required for the protection of the public peace, health, safety, morals, welfare or convenience.

That the said pretended ordinance amounts to and is a denial to persons within the said city of the equal protection of the laws, in that the same denies to persons owning property within the aforesaid district the right to use the same for the manufacture of brick while permitting to persons owning property outside of the said district the right to use their said property for the said purposes, and particularly in that the said pretended ordinance denies to your petitioner the right to manufacture brick on his said property and to maintain thereon a brickyard or a brickkiln, while the other brick manufacturers named in this petition are permitted, without regulation or restriction of any kind, whatsoever, to manufacture brick on their property and to maintain thereon brickyards and brickkilns, even though, as herein alleged, your petitioner's brickyard and brick manufacturing plants are not any greater a nuisance or a menace than are the other brickyards and brick manufacturing plants mentioned in this petition.

That the said pretended ordinance and the enforcement thereof will deprive your petitioner of his said property without due process of law.

That the said pretended ordinance amounts to the taking of your petitioner's said property without due process of law and without due or any compensation.

That the said pretended ordinance is and will be retroactive and will deprive your petitioner of property lawfully acquired and law-

28 fully used prior to the adoption of the said pretended ordinance and prior to the annexation of the aforesaid territory to the said City of Los Angeles.

That the said pretended ordinance does and will deprive your petitioner of the liberty and right of carrying on a lawful business in a lawful manner and without unreasonable restrictions, and deprives and will deprive your petitioner of the liberty and right of making a beneficial, profitable and lawful use of his said property.

Your petitioner further alleges that the said pretended ordinance is not a reasonable or a bona fide exercise of the police power of the said City of Los Angeles for the welfare or comfort of the inhabitants of the district described in the said pretended ordinance or of any other portion of the said city, but that the said pretended ordinance is merely an attempt on the part of the said city, under color of its police power, to create an unjust, arbitrary and unreasonable discrimination against the said brick making business in which your petitioner is engaged, for the sole and only purpose of causing your petitioner to discontinue his said business, thereby confiscating your petitioner's said property and depriving him of the same without due process of law and without compensation.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted, directed to the said C. E. Sebastian, Chief of Police of the City of Los Angeles, commanding him to have the body of your petitioner before your Honors forthwith upon the granting of the writ herein prayed for, to do and receive what shall then and there be considered by your Honors concerning this petitioner, together with the time and cause of his detention and the said writ; and that your said petitioner above named be restored to his liberty.

J. C. HADACHECK.

Petitioner.

G. C. DE GARMO,
EMMET M. WILSON,
Attorneys for Petitioner.

29 STATE OF CALIFORNIA,
County of Los Angeles, ss:

J. C. Hadacheck, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

J. C. HADACHECK.

Subscribed and sworn to before me this 24th day of October, 1912.

[NOTARIAL SEAL.] ELSIE EVERSHED,
*Notary Public in and for the County of
Los Angeles, State of California.*

(Here follows map marked page 30.)

31 [Endorsed:] Crim. 1760. Copy. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck, for a Writ of Habeas Corpus. Petition for a Writ of Habeas Corpus. Filed Oct. 25, 1912. B. Grant Taylor, Clerk. By Wm. F. Traeger, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Cor. Fifth and Spring Sts., Los Angeles, Cal., Attorneys for Petitioner.

By the COURT:

On reading and filing the within petition, it is ordered that the writ of habeas corpus issue as therein prayed, returnable before the Supreme Court in banc at the City of Sacramento, on Monday, November 11, 1912, at two o'clock p. m.

It is further ordered that pending the hearing and decision herein the petitioner be released from custody on furnishing cash bail in the sum of one hundred dollars, or bond in the penal sum of two hundred dollars, approved by a judge of the Superior Court.

BEATTY, C. J.

Filed Oct. 25, 1912. B. Grant Taylor, Clerk. By Mackrille, Deputy.

32 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Return to Writ of Habeas Corpus.

To the Honorable W. H. Beatty, Chief Justice, and to the Honorable Associate Justices, of the Supreme Court of the State of California:

In obedience to the command of the annexed writ of habeas corpus, I, Charles E. Sebastian, Chief of Police of the City of Los Angeles, in the County of Los Angeles, State of California, do hereby certify and return that the Petitioner, J. C. Hadacheck, who was arrested on the 24th day of October, 1912, was held pending arraignment on the charge set forth in a complaint duly filed with the Police Court of the City of Los Angeles, a copy of which is hereto annexed, and during such time pending arraignment on this charge was placed in the custody of this respondent. That while thus in custody of the respondent and by him imprisoned, the said petitioner applied for a writ of habeas corpus, which writ was served upon respondent, and obedient to the command endorsed upon the petition for the writ, the petitioner was released on bail in the sum of One hundred Dol-

33 lars (\$100.00) cash, and said petitioner is now at liberty and therefore no longer in my custody nor restrained by me.

Wherefore, I, the respondent herein, cannot produce his body before this Honorable Court as by said writ I am commanded.

And as a further return to the writ hereto annexed, said Charles E. Sebastian, the respondent, alleges as follows:

I.

Respondent denies that the imprisonment, restraint, detention and confinement of the petitioner pending arraignment upon the complaint set forth in the petition of petitioner, a copy of which complaint is annexed hereto, are illegal for the reason set forth in the petition of petitioner, or for any other reason.

II.

Respondent denies that the Ordinance under which said complaint is drawn amounts to a confiscation of the property of petitioner; and denies that its enforcement will entirely deprive petitioner of his said property and the use thereof; and denies that petitioner cannot obtain compensation therefor.

III.

Respondent denies that there is no lawful or just reason for prohibiting the manufacture of brick, or the maintenance of a brick yard, within the district described in the said Ordinance; and denies that the said business is not in the nature of a nuisance as defined in Section 3479 of the Civil Code of the State of California; and denies that said business cannot be, and is not, and will not 34 be, dangerous or detrimental to the health, or to the morals, or to the safety, or to the peace, or to the welfare, or to the convenience of any of the inhabitants of said district, or of said City. Respondent denies that in the maintenance and carrying on of said brick making business the petitioner has complied with, and was complying with, all the laws of the State of California and with all the regulations and ordinances of the City of Los Angeles, except the ordinance set forth in said petition.

IV.

Respondent denies that said brick yard belonging to said petitioner and situated upon real property described in petitioner's petition, is kept in a clean and sanitary condition; and denies that said business is so conducted that there is no disturbance of the peace, quiet, or enjoyment of any person residing in the community; and denies that there is no danger or menace to the health, safety, or comfort of citizens resulting therefrom; and denies that there are no noises arising from the maintenance or operation of said business, causing disturbance or discomfort to any person; and denies that there are no noxious odors arising from said brick making plant of petitioner; and denies that owing to the situation of said brick yard and by reason of the use of a metal hood and smoke-stack over the burning kilns of petitioner, there is an extremely small amount of smoke emitted from any kiln; and denies that smoke from said kilns rises through said smoke-stack and is dissipated in the air to such an extent that it does not disturb the peace, quiet, or enjoyment of any person, and is not a nuisance or a menace in any manner whatsoever.

V.

Respondent denies that the brick manufacturing plant of petitioner does not create greater discomfort, and is not any more of a nuisance and detrimental to the property located, or to the persons residing, in the vicinity thereof, than are other brick making plants in said City situated in that portion of the City known as Boyle Heights; and denies that said brick making plant is no more of a nuisance than any other brick making plant in said City. Respondent denies that no effort of any kind, either by ordinance or otherwise, has ever been made by said City to suppress, prohibit or regulate the operation or maintenance of other brick yards.

VI.

Respondent denies that petitioner's brick yard and brick manufacturing plant are in all respects, or in any respect, similar and are operated in a manner in all respects, or any respect, similar to the brick yards and brick manufacturing plants mentioned in said petition other than petitioner's said plant.

VII.

Respondent denies that no ordinance, or regulation of any kind, has ever at any time been adopted by the City of Los Angeles regulating or attempting to regulate the manufacture of bricks, or the manner of conducting or operating brick yards and brick kilns.

VIII.

36 Respondent denies that the complaint set up in petitioner's petition does not state a public offense for the reason that said ordinance is void and invalid and in violation of the provisions of the Constitution of the State of California and of the provisions of the Fourteenth Amendment of the Constitution of the United States; and denies that said complaint does not state a public offense for any reason. But respondent alleges that it does set forth a valid and proper offense under the terms of a valid and proper ordinance of the City of Los Angeles; and denies that it is an attempt on the part of the City to make and enforce a law that abridges the privileges and immunities of the citizens of the United States, for the reasons set forth in petitioner's petition, or for any other reason.

IX.

Respondent denies that said ordinance is void and invalid as against the vested rights acquired by petitioner, for the reasons set forth in petitioner's petition, or for any other reason.

X.

Respondent denies that said ordinance is invalid, null and void, for the reason that it attempts to abridge the privileges and immuni-

ties of the petitioner, in that it purports to prevent the establishment and maintenance of brick yards and brick kilns and not to regulate and control the manner in which they shall be operated.

XI.

Respondent denies that said ordinance is in violation of said Fourteenth Amendment to the Constitution of the United States, in that it attempts to prohibit the establishment and maintenance of a brick yard and manufacturing plant by said petitioner; and
 37 denies that said business of petitioner is not a nuisance, and alleges that for the reason that said brick yard and manufacturing plant of petitioner are nuisances and are conducted in a manner that renders them a nuisance to those living in the locality in which they are established, and for the reason that all brick yards and manufacturing plants partake of the nature of all nuisances, that said ordinance is valid and is a proper and necessary regulation for the health, safety, peace, and comfort of the residents of the locality in which the brick yard and brick manufacturing plant are established.

XII.

Respondent denies that said ordinance is void or invalid because, if enforced, it will foster a monopoly; and denies that said ordinance, if enforced, will foster a monopoly; and denies that it will prevent petitioner from entering into competition with other persons or corporations engaged in the same business.

XIII.

Respondent denies that the boundaries of the district described in said ordinance are not determined by natural or geographical lines or objects; and denies that said boundaries are not determined with regard to the conditions of the population and inhabitants of the City of Los Angeles; and denies that said boundaries are not determined with regard to the population of the portion of the City of Los Angeles in which said brick yard of petitioner is located.

38

XIV.

Respondent denies that said ordinance amounts to or is an oppressive, unreasonable, or unjust interference with and invasion of the use of private property by petitioner for a lawful purpose. And denies that said ordinance is unnecessary for the preservation of the public peace, health, safety, welfare, and convenience. And denies that said ordinance does not have a uniform operation as to all classes upon which it proposes to operate. And denies that said ordinance and its enforcement will deprive petitioner of his property without due process of law. And denies that the said ordinance is merely an attempt, or any attempt, on the part of the City of Los Angeles to create an unjust, arbitrary, or unreasonable discrimination against the brick making business of petitioner, or in which petitioner is engaged.

XV.

Respondent alleges that said ordinance set forth in petitioner's petition is a valid and necessary ordinance for the protection of the peace, health, and safety of those citizens and residents of the City of Los Angeles who reside in the vicinity of said business of petitioner in that locality in said City, for the reasons that said brick yard business of petitioner and said business of other persons in the said district constitute a menace to the health, safety, peace and comfort of said citizens and residents.

39

XVI.

Respondent further alleges that there are now in the City of Los Angeles two districts laid out by ordinance in which the business of brick making is prohibited, namely: Ordinance No. 13,077 (New Series), and Ordinance No. 19,988 (New Series); that the latter ordinance is the ordinance in question in this proceeding; that by the terms of the former ordinance a large district is laid out in which brick making and brick yards are prohibited, said district being considerably larger in territory than the district in which petitioner's business is located. That in addition to these regulations, the said business of brick making in said City of Los Angeles is regulated by an ordinance known as the Residence District Ordinance (No. 22,798, New Series,) by the terms of which ordinance all businesses having mechanical power, excepting five horse power motors, are prohibited; that in this way brick making industries having mechanical power for the purpose of making and forming the bricks are prohibited in a large part of the City of Los Angeles other than in the districts laid out by said Ordinances Nos. 13,077 and 19,988 (New Series).

XVII.

That annexed hereto and marked "Exhibit D" is a map of the main part of the City of Los Angeles and all those parts thereof north of Manchester Avenue; that said map shows: Fire District No. One, outlined in red; the Industrial Districts, outlined in yellow, the Residence District Exceptions, outlined in green; and the brick yard districts, outlined in brown. That by the terms of said Ordinance No. 22,798 (New Series) all businesses having mechanical power are prohibited, except in said Fire District, Industrial Districts, and Residence District Exceptions; that, therefore, said business

40 of brick making and the operation of brick yards and kilns are prohibited where mechanical power, other than five horse power motors, is employed, in a large part of the City of Los Angeles, approximately two-thirds thereof, said part being known as the Residence District; that said Residence District is determined by excepting from the area of the entire City of Los Angeles the said Fire, Industrial, and Residence Exception Districts, thus permitting approximately one-third of the City of Los Angeles, most naturally adapted to industrial development and wherein are situated large beds of clay, to be utilized for the purpose of making, burning, and selling brick.

XVIII.

Respondent alleges that the district laid out by the terms of said ordinance herein involved, namely, Ordinance No. 19,989 (New Series), is almost exclusively a residence district; that the few businesses therein located are in the nature of commercial enterprises, such as small shops and stores; that in said district there is no large industry conducted, to the knowledge of this respondent, except the business of petitioner and the business of one other firm engaged in the manufacture of brick; that said district is closely built up in many places; and that said business of petitioner lies between two Streets, namely: Woolsey Avenue and Crenshaw Boulevard, which streets are used exclusively for the building of residences; and that the property line of the residences on said streets abuts on one side or the other of the property of petitioner; and that the maintenance of said brick yard and brick kilns upon the property of petitioner constitutes a growing and continuing menace to the health, peace and safety of those residing on said streets; that annexed
41 hereto are the affidavits of the following residents of the locality in which said brick yard and brick manufacturing plant of petitioner are located, namely:

Ida S. Wilson, 1325 Woolsey Avenue.
W. H. Riley, 1339 Woolsey Avenue.
Arminta B. McGarvin, 1319 Woolsey Avenue.
Charles L. Moon, 1325 Woolsey Avenue.
Ed Prudhon, 1177 Norton Avenue.
E. B. Myers, 1310 Crenshaw Boulevard.
Betty B. Brodin, 1341 Woolsey Avenue.
Frank Heron, 1338 Woolsey Avenue.
Charles M. Hoff, 1245 Norton Avenue.
S. P. Mansfield, 4066 West Pico Street.

XIX.

Respondent alleges that, as appears by the affidavits of the above named persons, the fumes, gases, smoke, soot, steam, and dust arising from the brick making plant of petitioner have from time to time caused sickness and serious discomfort to those living in the vicinity; that, as further appears by these affidavits, said business of petitioner is a menace to the health and safety of those living in said district and near the business of petitioner, and is a constantly growing menace by reason of the building up of said locality as a strictly and exclusively residence section. That annexed hereto, and marked "Exhibits A, "B" and "C," are photographs of said business location of petitioner and the surrounding streets. That said photograph marked "Exhibit A" is a representation of the yard of petitioner and the brick making plant thereon. That the photograph marked "Exhibit B" is a representation of Woolsey Avenue
42 looking north, with the said brick yard of petitioner in the rear of the houses on the left of the street here represented. That the photograph marked "Exhibit C" is a representation of Crenshaw Boulevard, looking north-east over the homes on the East

side of said Boulevard, and showing the metal hood on the brick kiln of petitioner.

XX.

Respondent alleges that, as appears by the said affidavits annexed hereto and the photographs marked Exhibits "A," "B," and "C," the said brick yard and brick manufacturing plant of petitioner are located in close proximity to the dwellings and homes of many persons, and that said brick yard and brick manufacturing plant, as conducted by petitioner, are dangerous to the health of those dwelling in said residences; that in the past three years the district laid out by said ordinance has grown rapidly and is one of the most exclusive residence sections of the City of Los Angeles.

XXI.

Respondent alleges that it is impossible to conduct any brick yard in the same close proximity to dwellings as that in which petitioner's brick yard is located, without causing a menace to the health of those living in said district, and without seriously causing their discomfort and disturbing their peace and quiet in their homes, not only by reason of the fumes generated by the combustion of oil for the burning of bricks, and by the smoke and soot from the same source, but by the noise created by the generation of steam and the escape thereof, and the dust created by the passage of many wagons and animals over unpaved and unprotected private roadways on said property.

XXII.

Respondent alleges that within the industrial sections of the City of Los Angeles, within which brick yards may be maintained unmolested and without the transgression of any ordinance of said City, there are beds of clay which may be utilized for brick making purposes; and that said industrial sections of the City of Los Angeles include, approximately, one-third thereof in area, or about thirty square miles; that said industrial sections, by reason of their natural location along and about the bed of the Los Angeles River, and by reason of the fact that they are traversed throughout their length by the three Trans-Continental Railroads entering the City of Los Angeles, are adapted for industrial purposes and are fully suitable for the maintenance of brick yards.

XXIII.

That by reason of the facts above set forth in this return, respondent alleges that said ordinance is a valid and necessary regulation for the preservation of the peace, health, safety and comfort of the residents of said City of Los Angeles in the district covered by said ordinance, and that said ordinance is enacted as a proper and necessary exercise of the police power of the City of Los Angeles, and that, therefore, said ordinance is not unconstitutional, is not void, or in-

valid for any reason, but is a valid and subsisting police measure necessary for the good order of said City of Los Angeles and its inhabitants.

44 Wherefore, said respondent, Charles E. Sebastian, prays that said writ of habeas corpus directed to respondent be dismissed and petitioner remanded to his, respondent's custody and restraint.

Dated at Los Angeles, County of Los Angeles, State of California, this seventh day of November, 1912.

CHARLES E. SEBASTIAN,
*Chief of Police of the City of Los Angeles, County
of Los Angeles, State of California.*

44½ In the Police Court of Los Angeles City, in the County of Los Angeles, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
J. C. HADACHECK, Defendant.

Complaint.

Personally appeared before me this 24th day of October, 1912, Ray E. Nimmo of Los Angeles, who first being duly sworn, complains and says: That on the 24th day of October, 1912 in the City and in the County of Los Angeles, State of California, a misdemeanor was committed by J. C. Hadacheck who at the time and place last aforesaid, did wilfully and unlawfully establish, conduct, operate and maintain a brick yard, brick kiln and establishment, factory and place for the manufacture and burning of brick, within that certain portion of the City of Los Angeles described in Section 1 of Ordinance No. 19,989 (New Series) of said City of Los Angeles.

All of which is contrary to the forms of the Ordinances and Resolutions adopted and approved by the Municipal authorities of said City, in such cases made and provided, and against the peace and dignity of the People of the State of California.

Said Complainant therefore prays that a warrant may be issued for the arrest of said J. C. Hadacheck and that he may be dealt with according to law.

RAY E. NIMMO.

Subscribed and sworn to before me this 24th day of October, 1912.

[SEAL.]

DAVID MARTIN,
*Clerk of the Police Court of Los Angeles
City, in said County and State.*

45 No. —. In the Police Court of Los Angeles City, County of Los Angeles, State of California. The People of the State

of California, Plaintiff vs. J. C. Hadacheck, Defendant. Complaint Filed Oct. 24, 1912. Jos. F. Chambers, Police Judge of Los Angeles City, County of Los Angeles. Ray E. Nimmo, City Prosecutor.

46 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Ida S. Wilson, being first duly sworn, deposes and says: That she resides at Number 1325 Woolsey Avenue in the City of Los Angeles, State of California. That she is a member of the family of Charles L. Moon, who has also made affidavit in the above entitled proceedings. That in the brick making processes of petitioner upon his premises adjoining those upon which this deponent lives there is created large quantities of smoke, soot, gas and steam, and that these elements greatly disturb this deponent and cause a serious menace to her and to the other members of the household. That while the petitioner has caused to be placed about the burning kilns a metal hood surmounted by a stack, that notwithstanding these devices the conditions which have always obtained in and about these premises still exist. That said devices do not to any material extent lessen the nuisance caused by the escaping steam, smoke, gas and soot, and that said elements continue to be a menace to the health and safety of this deponent and others residing in the same dwelling with her.

Mrs. IDA S. WILSON.

Subscribed and sworn to before me this 2nd day of November, 1912.

[SEAL.]

ANNA L. BROWN,
*Notary Public in and for the County of
Los Angeles, State of California.*

47 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. H. Riley, being first duly sworn, deposes and says: That he resides at Number 1339 Woolsey Avenue in the City of Los Angeles, State of California. That the dwelling in which he lives

is contiguous to the property of Petitioner herein, and that the yard in the rear of deponent's premises abuts upon the brick yard of petitioner, said brick yard being west of the property of the deponent.

That from time to time during the period of residence of this deponent in the above mentioned dwelling, he and his family have been subjected to a great annoyance by reason of the conduct of the business of petitioner. That upon several occasions when the petitioner has burned brick in brick kilns upon his premises for days at a time great clouds of smoke, steam, and soot have been discharged from said kilns and have surrounded the dwelling of deponent and have entered the windows and doors of said dwelling

in such a manner as to make it a great menace to health
48 and a great injury to the welfare of deponent's family. That

not only has the nuisance been created by the smoke and steam, but in addition thereto noxious gases, generated by the combustion of the oil which is used to bake the bricks, have greatly menaced the health and safety of deponent and his family, not only during the day but at late hours of the night, and have made it necessary for the deponent frequently to keep his windows closed and prevent ventilation in his house. That soot in large quantities has frequently been deposited upon the premises, and that great clouds of dust have been blown upon the premises of deponent in such a way as to create a further nuisance. That the prevailing winds are from the West and South-west, and that all the afternoon and a good share of the morning the wind blows all the smoke, steam, gases, odors and dust from the premises of petitioner to those of deponent.

That by reason of these conditions during the process of burning brick, not only is the welfare of deponent's family jeopardized, but his peace and comfort in his home, and the peace and comfort of his family are greatly disturbed.

W. H. RILEY.

Subscribed and sworn to before me this 28th day of October, 1912.

[SEAL.]

H. V. HOFFMAN,
*Notary Public in and for the County of
Los Angeles, State of California.*

49 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Arminita B. McGarvin, being first duly sworn, deposes and says: That she resides at Number 1319 Woolsey Avenue in the City of

Los Angeles, State of California, and that the property which she occupies as a residence adjoins the property of the above named petitioner, and that the rear of her house is within one hundred feet of a brick kiln of the petitioner situated on his property. That the proximity of petitioner's brick kilns and brick manufacturing plant to the residence of the deponent constitutes a growing menace to the health of this deponent and to the health of those who are domiciled with her. That the nuisance and menace to health which has hereinbefore been mentioned consists of the various processes of brick making which are almost continuously carried on on the premises of petitioner. That such processes include the mining of clay, the formation by machinery of the same into bricks, the drying and hauling of these bricks to kilns, the building of kilns, the burning and baking of the bricks, and the removal of the same for sale.

50 That these various steps in the brick making business involve the combustion of great quantities of oil in the burning process, the smoke from which oil spreads about in the immediate neighborhood and particularly about the premises of this deponent. That large quantities of soot are deposited in and about the premises of this deponent. That in this process of brick making great quantities of steam are generated, and the generation of said steam causes a constant hissing and penetrating noise, which is intensely injurious and irritating to the nervous system of those who live nearby.

That this deponent has contracted a bad cough, precipitated by irritation to the throat caused by the breathing of the noxious gases and fumes and smoke which arise from this process of brick burning. That unless this deponent is given relief from this condition, and the other members of deponent's household are relieved, their health will be greatly jeopardized, and the peace and comfort of their home life will be disturbed, and ultimately they will be obliged to take up their residence elsewhere.

Deponent further says that notwithstanding the devices which petitioner has caused to be used in the burning of his brick kilns, the smoke and other elements arising from the combustion of oil still continue to be a menace to this deponent and other members of her household. That this deponent and other members of her household have had their health seriously affected by the conditions, and that throat affections have resulted during the summer of 1912 from such conditions about petitioner's premises, and that deponent and other members of her family have been made ill despite the use of the attempted or so-called smoke consuming devices, which this deponent asserts do not consume or eradicate the said smoke and other elements arising from the combustion of oil in the kilns in any material degree.

ARMINTA B. McGARVIN.

Subscribed and sworn to before me this 30th day of October,
[SEAL.] ANNA L. BROWN,
1912.

Notary Public in and for the County of
Los Angeles, State of California.

51 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

Charles L. Moon, being first duly sworn, deposes and says: That he resides at Number 1325 Woolsey Avenue in the City of Los Angeles, State of California, and that his property adjoins the property of petitioner herein upon the east of petitioner's property, the rear part of deponent's premises abutting upon the yard of petitioner, and that the nearest brick kiln of petitioner is within about fifteen feet of the rear line of the lot upon which deponent's residence is built. That in the making of petitioner's brick, large quantities of oil are consumed and that from the combustion of this oil great quantities of smoke and soot and steam are caused to be disseminated to the outside air, and that said smoke and steam in great clouds surround the premises of this deponent, and that quantities of soot are deposited upon said premises. That a most objectionable feature of this business and that which deponent considers most dangerous is the escape of noxious fumes and gases from the kilns, which fumes and gases are caused by the combustion of the oil and such other chemical changes as are caused in the burning of the brick. That these gases fill the residence of deponent and have frequently caused the illness of members of deponent's family. That this condition has existed during the entire time that bricks were in the process of being baked upon the premises of petitioner.

Deponent further says that in the making of brick steam is discharged or allowed to escape in great quantities from pipes and other apparatus in and about the kilns of petitioner, and that in escaping and being discharged the steam causes a penetrating and hissing noise which is a great distress and injury to the members of deponent's family, and which noise continues all day and all night, causing deponent and his family to lose their night's rest and sleep, and thus constitutes an injury to the nervous system of all those domiciled in the home of deponent.

CHARLES L. MOON.

Subscribed and sworn to before me this 29th day of October, 1912.

[SEAL.]

KARL L. RUTZER,
*Notary Public in and for the County of
Los Angeles, State of California.*

My commission expires June 14, 1914.

52 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Ed Prudhon, being first duly sworn, deposes and says: That he resides at Number 1177 Norton Avenue in the City of Los Angeles, State of California. That this deponent has been greatly annoyed by smoke, gas and soot discharged from the brick kilns of petitioner. That during the summer of the year of 1911 the wife of this deponent and another member of his family were made ill and their nostrils and mouths were blackened during the night by the breathing of soot discharged from the kilns of petitioner, and that they suffered greatly therefrom. That members of deponent's family have from time to time suffered on each occasion of the burning of brick on petitioner's premises, and that such illnesses have been caused in each case by the soot, smoke and gases which they were compelled to breathe while in and upon their own premises.

ED PRUDHON.

Subscribed and sworn to before me this 30th day of October, 1912.

[SEAL.]

ANNA L. BROWN,
*Notary Public in and for the County of
Los Angeles, State of California.*

53 In the Supreme Court of the State of California.

Prosecuting Attorney's Office.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

E. B. Myers, being first duly sworn, deposes and says that he resides at Number 1310 Crenshaw Boulevard in the City of Los Angeles, State of California. That the premises of this deponent are situate on the East side of Crenshaw Boulevard and are contiguous to the premises of petitioner herein. That the prevailing winds during the late morning and afternoon are from the west, and that during such time the smoke from petitioner's brick kilns is carried in an easterly direction away from the premises of this deponent, but at the other times of the day and night the smoke caused by the consumption of crude oil upon the premises of petitioner is fre-

quently blown in the direction of this deponent's premises, and causes this deponent and the members of his family a great deal of annoyance. That in addition thereto, great quantities of dust are deposited upon deponent's premises as a result of the brick making operations and the driving of horses and vehicles upon petitioner's premises.

Deponent further says that this district is almost exclusively a residence district, and that outside of the brick making industry there is no industry of any size, or work which is injurious to the neighborhood, in or about this part of the city. That there are a few stores and other retail mercantile establishments upon Pico Street, but not in this immediate neighborhood, and that this neighborhood is built up almost solidly with residences.

Deponent further says that one of the most annoying conditions appertaining to petitioner's business is the constant escape of steam from pipes located about the brick kilns of petitioner while bricks are being baked in said kilns. That this steam escapes with a loud and penetrating noise, which continues sometimes all night and prevents deponent and members of his family from enjoying their needed sleep.

E. B. MYERS.

Subscribed and sworn to before me this 1st day of November, 1912.

[SEAL.]

ANNA L. BROWN,
*Notary Public in and for the County of
Los Angeles, State of California.*

54 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Bettie B. Brodin, being first duly sworn, deposes and says: That she resides at Number 1341 Woolsey Avenue in the City of Los Angeles, State of California. That the premises occupied by her are south-east of that portion of petitioner's premises where most of the brick making is done. That while the prevailing winds blow toward the north-east from the south-west during the middle of the day, yet at early hours of the morning the wind changes and causes quantities of gas and smoke and steam from the brick kilns of petitioner to be blown around the home of this deponent. That in addition to the smoke and soot thus discharged upon deponent's premises, great quantities of dust are also deposited there from the premises of petitioner. That said dust is caused by the constant driving to and fro upon said petitioner's premises by wagons not only engaged in petitioner's business, but by wagons used in the carriage

of rubbish which is deposited upon petitioner's premises. That deponent and her family are annoyed greatly during the hours of the night by the noise caused by escaping steam, which noise is greatly detrimental to the health of deponent and her family.

BETTIE B. BRODIN.

Subscribed and sworn to before me this 30th day of October, 1912.

[SEAL.]

ANNA L. BROWN,
*Notary Public in and for the County of
Los Angeles, State of California.*

55 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Frank Heron, being first duly sworn, deposes and says: That he resides at Number 1338 Woolsey Avenue in the City of Los Angeles, State of California; that the residence of this deponent is upon the East side of Woolsey Avenue and within a distance of about two hundred fifty feet of the kilns of the petitioner herein, who is engaged in the brick making business. That upon the property of petitioner the brick making business is carried on, and that in connection therewith the various steps in the manufacture of brick cause great inconvenience, annoyance and danger to the health of deponent and his family. That in connection with the process of brick baking the petitioner uses quantities of steam, which escapes from parts of the brick kilns or pipes therein in such a manner as to create a constant hissing noise, which continues night and day. That this deponent and deponent's family have been caused the loss of sleep for entire nights at a time by reason of this constant noise,

and in addition to the annoyance created by the noise, great 56 quantities of dust are deposited upon deponent's premises.

That said dust is caused by the large number of heavy brick wagons and other vehicles that are passing over the premises of the petitioner constantly during the day. That in the depression formed upon the premises of petitioner by the removal of clay for brick making purposes there have been deposited from time to time large quantities of rubbish, and that wagons are passing constantly back and forth upon the roadway upon the premises of petitioner for the purpose of dumping the rubbish, and that these wagons, in addition to those of petitioner engaged in the removal of brick, cut deep ruts into the roadway upon petitioner's premises and constantly stir up large quantities of dust, which is deposited upon deponent's premises and fill his house.

FRANK HERON.

Subscribed and sworn to before me this 29th day of October, 1912.
[SEAL.]

WALTER W. WILLIAMS,
*Notary Public in and for the County of
Los Angeles, State of California.*

57 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Charles M. Hoff, being first duly sworn, deposes and says: That he resides at Number 1245 Norton Avenue in the City of Los Angeles, State of California. That he and the members of his family have been greatly disturbed by the conditions arising from the brick making plant of petitioner. That in addition to the disturbing factors of gas, smoke, and soot, discharged from petitioner's premises upon the premises of this deponent, the noise occasioned by the escaping steam upon petitioner's premises has been also greatly disturbing and injurious to deponent and his family. That these noises are caused by the steam escaping from pipes, which steam is used in the brick making process; that the noise continues during the period while the brick is being baked for the entire duration of the night, and that said deponent and his family have lost their natural repose and rest during the night hours on several occasions by reason of these conditions.

CHARLES M. HOFF.

Subscribed and sworn to before me this 30th day of October, 1912.
[SEAL.]

ANNA L. BROWN,
*Notary Public in and for the County of
Los Angeles, State of California.*

58 In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

S. P. Mansfield, being first duly sworn, deposes and says: That he resides at Number 4066 West Pico Street in the City of Los Angeles, State of California. That the premises upon which he resides are contiguous to the premises of the petitioner herein, and that upon petitioner's premises there is conducted a brick making business which seriously interferes with the peace and comfort of the family

of deponent. That said interference consists of the dissemination through the atmosphere about the premises of petitioner and deponent of large quantities of dust, smoke, soot, and steam and noxious gases. That at times while petitioner is burning and baking bricks upon his premises the residence of this deponent is surrounded by gas and smoke, and that quantities of soot are deposited upon deponent's dwelling. That by reason of these conditions during the process of brick burning upon petitioner's premises, this deponent is obliged to keep the windows in his dwelling closed and to suffer a lack of proper ventilation by reason thereof.

S. P. MANSFIELD.

Subscribed and sworn to before me this 30th day of October, 1912.

[SEAL.]

ANNA L. BROWN,

*Notary Public in and for the County of
Los Angeles, State of California.*

59 [Endorsed:] Crim. 1760. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck, for a Writ of Habeas Corpus. Return to Writ of Habeas Corpus. Filed Nov. 7, 1912. B. Grant Taylor, Clerk. By M. C. Van Allen Deputy. Ray E. Nimmo, Acting City Prosecutor, Attorney for Respondent, 326 West First Street, Los Angeles, Cal.

60 Filed March 3, 1913. B. Grant Taylor, Clerk, by A. S. Ramage, Deputy.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Affidavit in Reply to the Return Herein and to Affidavits Attached to the Return.

In the Supreme Court of the State of California.

Crim., 1760.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

J. C. Hadacheck being first duly sworn, deposes and says: That he is the petitioner in the above entitled matter, that he has read the respondent's return to the writ of Habeas Corpus, and that by way of reply to the said return and to the said affidavits, affiant says;

Affiant denies that the ordinance set forth in the petition herein is a valid and necessary or a valid or necessary ordinance for the protection of the peace, health and safety, or of the peace or health or safety of the citizens and residents of the City of Los Angeles who reside in the vicinity of the business of the petitioner or of any other citizens or residents of the said city, for the reasons set forth in the respondent's said return or for any other reason; denies that

the business of the petitioner constituted or has constituted a menace to the health or safety or peace or comfort of said city.

Referring to paragraph 16 of the respondent's said return, affiant states that the ordinance referred to as Ordinance No. 13077, 61 (new series) was passed and adopted in July, 1906, for the purpose of prohibiting the operation of a brickyard situated within the district described in the said ordinance and that by the terms of the said last mentioned ordinance, all persons maintaining any brickyard within the said district on the 22nd day of January, 1906, were not required to remove said brickyard from the said district within two (2) years after the said last mentioned date.

Affiant further states that by the terms of the ordinance set out in the petition on file herein no time was given this affiant within which to remove his brick manufacturing business and that immediately upon the taking effect of the said ordinance this affiant was required by the terms thereof to remove entirely from the district described in the said ordinance.

Further referring to Paragraph 16, of the respondent's said return, affiant says that the so-called residence district ordinance referred to therein attempts to prohibit the operation of certain businesses having mechanical power and that the said ordinance does not prohibit the maintenance of any business or the operation of any machine that is operated by animal power.

Referring to the allegations in the said return and in the affidavits attached thereto to the effect that the place of business of this affiant is located between two residence streets, affiant states that his premises and place of business fronts upon Pico Street, and that Pico Street is one of the main business streets of the City of Los Angeles, extending easterly and westerly across practically the entire city and that practically all of the frontage upon the said Pico Street is devoted to business purposes.

Affiant denies that the maintenance of his said brickyard and brickkiln upon his property, constitutes or has constituted a growing or a continuing or any menace to the health or peace or safety of the persons residing adjacent thereto.

62 Affiant further states that several of the persons whose affidavits are annexed to the respondent's return testified against this affiant in an action in the police court of the City of Los Angeles in which this affiant was prosecuted for the violation of the ordinance complained of in this proceeding and that upon direct examination such persons testified substantially to the facts set out in their said affidavits, but that upon cross examination the said persons so testifying without exception failed to substantiate the statements made upon direct examination.

Affiant further states that he resides upon the premises on which his said brick manufacturing establishment is located and that he has never been informed and has never known of any illness being caused in the said locality by reason of any gases, smoke, soot, steam or dust arising from his said brick making plant and affiant further states that no sickness has ever been caused in his own family thereby. Affiant denies that his business is a menace to the health, or to the safety of any person living in said district or near thereto;

and this affiant denies that the same is a constantly or at all growing menace by reason of the building up of the said locality or otherwise or at all.

Affiant denies that it is impossible to conduct a brickyard in the same close proximity to dwellings as that in which affiant's business is located without causing a menace to the health of those living in the said district and without causing a menace or a discomfort, or disturbing the peace or quiet or enjoyment of any person, or otherwise, either by reason of the fumes generated by the combustion of the oil used for the burning of brick, or by the smoke and soot from the same source, or by the noise created by the generation of steam or by the dust created by the passage of wagons over private roadways or in any manner whatsoever.

63 Affiant denies that within the industrial sections of the city within which brickyards may be maintained without the transgression of any ordinance of the said city there are beds of clay that may be utilized for brick making purposes, and denies that there are any beds of clay within any such industrial districts of the same fine quality as the bed of clay situated upon affiant's premises.

Affiant further states that even if such beds of clay existed as alleged in the said return, this affiant would be unable to purchase or to utilize the same. Affiant denies that the said industrial sections of the city are the only portions of the said City that are suitable for the maintenance of brickyards.

Affiant further denies that by reason of the facts or by reason of any of the facts set forth in the said return the said ordinance is a valid or necessary regulation for the preservation of the peace or health or safety or comfort of the residents of the said city or of the district described in the said ordinance or of any other portion of the said city and denies that the said ordinance was enacted or is enforced as a proper or necessary exercise of the police power of the said city of Los Angeles and denies that the said ordinance is constitutional or valid, or is necessary for the good order of the said city.

Referring to the affidavits attached to the respondent's said return, this affiant denies that there is or has been created upon his premises smoke, soot, gas or steam in large or any quantities and denies any such elements greatly or at all disturb any of the persons residing in the neighborhood of affiant's said business or cause a serious or any menace to any person or persons whatsoever.

64 Affiant denies that the metal hood placed by affiant about the burning kilns of brick permit the existence of the same conditions that existed about the said premises prior to the construction of the said hood.

Affiant denies that the said device does not to any material extent lessen the nuisance caused by escaping smoke, steam, gas or soot and denies that any of the said elements continue to be and are a menace to the health, or to the safety of any person or persons residing in the said locality.

Affiant denies that upon several or any occasions when he has burned brick in the brickkilns upon his premises great or any quantities of smoke or steam or soot have been discharged from the

said kilns or have surrounded or entered the dwelling of any person adjacent thereto, and denies that soot in large or any quantities has frequently or at all been distributed upon any premises adjacent to the said brickyard or that great or any clouds of dust have been blown upon any premises in such a way as to create a nuisance.

Affiant denies that by reason of the said or any conditions during the process of burning brick or at all the welfare of any family or of any person has been jeopardized or that the peace or comfort of any person or persons *have* been disturbed.

J. C. HADACHECK.

Subscribed and sworn to before me, this 19th day of February, 1913.

[SEAL.]

ELIZA P. HOUGHTON,
*Notary Public in and for the County of
Los Angeles, State of California.*

65

Opinion.

In the Supreme Court of the State of California.

(Filed May 15, 1913.)

Bank.

Crim., No. 1760.

Ex Parte J. C. HADACHECK on Habeas Corpus.

A writ of habeas corpus was issued by this court on the petition of J. C. Hadacheck, who alleged that he was held in custody under a complaint charging him with the violation of an ordinance of the city of Los Angeles, adopted in April, 1910, and designated No. 19,989, new series. The validity of the ordinance presents the sole question to be here determined.

By the terms of the enactment, it was declared to be unlawful for any person, firm or corporation to establish, conduct, operate or maintain, or to cause or permit to be established, operated or maintained, any brickyard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick, whether established prior or subsequent to the passage of the ordinance, within a described district or portion of the city of Los Angeles. A violation of any of the provisions of the ordinance was declared to be a misdemeanor. The district to which the prohibition was applied contains about three square miles. The petitioner is the owner of a tract of land, containing eight acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was directed had been annexed to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period of his ownership, used the land for

brickmaking, and has erected thereon kilns, machinery and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose.

66 In view of the recent decisions of this court in *Ex parte Quong Wo*, 161 Cal. 220, and *Ex parte Montgomery*, 163 Cal. 457, it cannot be necessary to enlarge upon the general question of the right of a municipal legislature to enact ordinances like the one before us. "There can be no question," says the court in *Ex parte Quong Wo*, "that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz.: to protect the public health, morals, safety and comfort. It is, of course, primarily for the legislative body clothed with this power to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts, unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulations." And these views are supported by a multitude of decisions, some of which are cited in the opinion from which we have quoted.

In the *Quong Wo* case, the business of a public laundry was held to be "of such a nature that it may be confined, in the lawful exercise of the police power, within defined limits in a city or town." The same rule was applied, in *Ex parte Montgomery*, to a lumber-yard. It is not to be doubted that establishments for the burning of brick fall equally within the class of occupations which may properly be regulated by restricting the location in which they may be followed. It is immaterial to the particular point under discussion that the conduct of a brickyard is not a nuisance per se. "The police power granted by the constitution is not restricted to the suppression of nuisances. It includes 67 the regulation of the conduct of business, or the use of property, to the end that the public health or morals may not be impaired or endangered. (*Laurel Hill Cemetery v. City and County*, 152 Cal. 464, 474; *Ex parte Lacey*, 108 Cal. 326; *Odd Fellows' Cem. Ass'n v. City and County*, 140 Cal. 226; *Ex parte Quong Wo*, *supra*). The burning of brick is a trade which may, when conducted in close proximity to dwelling-houses, be so offensive to those residing in the vicinity as to constitute a nuisance. (*Campbell v. Seaman*, 63 N. Y. 568 and eas. cit.; *Powell v. The Brookfield P. B. Co.*, (Mo. App.), 78 S. W. 648; 29 Cyc., 1168.) This is true of all trades which, in their operation, involve the discharge of smoke or offensive odors into the surrounding atmosphere. (*Catlin v. Valentine*, 9 Paige 575; *Davis v. Lamberson*, 56 Barb. 480; *Whitney v. Bartholomew*, 21 Conn. 213; *Cooper v. Randall*, 53 Ill. 24.) The plaintiff's business, therefore, is a perfect example of the kind

of occupation which may properly be confined by the legislative authority to locations in which its conduct will not be injurious to others. Counsel for petitioner rely strongly on *Ex parte Kelso*, 147 Cal. 609, where this court declares invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco. The ground of the decision was that the removal of rock from land is an operation that may be rendered entirely innocuous by proper regulation prescribing the manner of doing the work, and that therefore a total prohibition was an arbitrary and unreasonable invasion of private right. But the burning of brick, in the course of which more or less smoke is necessarily generated and released, is a different matter. Whether or not this trade, however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the district, is certainly a question upon which reasonable minds may differ. If this be so, the prop-

68 erty of entirely prohibiting the occupation within such districts is one for the legislative determination. The courts will not substitute their judgment upon this issue for that of the legislative body.

The right of the legislature, in the exercise of the police power, to regulate or, in proper cases, to prohibit the conduct of a given business, is not limited by the fact that the value of investments made in the business prior to any legislative action will be greatly diminished. (*Mugler v. Kansas*, 123 U. S. 623; *Grumbach v. Lelande*, 154 Cal. 684; *Ex parte Quong Wo*, *supra*). A business which, when established, was entirely unobjectionable, may, by the growth of population in the vicinity, become a source of danger to the health and comfort of those who have come to be occupants of the surrounding territory. If the legislature should then prohibit its further conduct, the proprietor can base no complaint upon the mere fact that he has been carrying on the trade in that locality for a long period.

The power to regulate the use of property or the conduct of a business is, of course, not arbitrary. The restriction must bear a reasonable relation to some legitimate purpose within the purview of the police power. The petition in this case contains allegations designed to show that the district affected by the ordinance complained of was of such a character that the maintenance of brick-yards therein could not affect the health or comfort of anyone. But the respondent has added to his return various affidavits tending to show that the region surrounding petitioner's brickyard has become primarily a residential section, and that the occupants of neighboring dwellings are seriously discommoded by the petitioner's operations. The evidence thus before us, when taken in connection with the presumptions in favor of the propriety of the legislative determination, is certainly sufficient to overcome any contention that the prohibition was a mere arbitrary invasion of private right,

69 nor supported by any tenable belief that the continuance of the business in its present location was so detrimental to the interests of others as to require suppression.

Nor does the petition, read in connection with the showing made by and with the return, support a claim that the ordinance was not enacted in good faith as a police measure, but was designed to discriminate against the plaintiff and the proprietor of another brickyard within the limited district. It is alleged that the boundaries of the district were fixed by the city council "for the sole and specific purpose of prohibiting and suppressing the operation and maintenance of the brick-making business of your petitioner" and of the other brick manufacturer above mentioned. But if such prohibition and suppression were proper for the protection of the object committed to the legislative care, it was the duty of the council to do what it did. The allegation cannot be construed to mean that the purpose of suppressing petitioner's plant was actuated by any motive of injuring the petitioner as an individual. We must assume that the council aimed to prohibit his business in its existing location because it deemed the continuance of the business there to be detrimental to the welfare of others.

The petitioner avers, too, that in other districts of the city there are brickyards which are quite as injurious to their neighbors as is the petitioner's establishment, and that the council has not prohibited the maintenance of such yards in these other districts. But this presents a question which is peculiarly for the determination of the legislative body. (*Ex parte Quong Wo*, *supra*.) Granted that there are reasons justifying the prohibition of the business within the area described in the ordinance, the city council, and not this court, is the body charged with the duty of deciding whether the conditions in other parts of the city require like prohibition. Without regard to the fact, shown in the return, that brickmaking is prohibited in a district other than that here involved,

we are not authorized to enter into an inquiry with a view
70 of determining whether, in our opinion, the prohibition complained of might not, with good reason, have been made more extensive. There is nothing, in connection with the averments on this point, to sustain the claim that the failure to apply the prohibition to other districts was due to any intent to discriminate against the petitioner. All that is made to appear is that the council did not share petitioner's opinion that brickmaking in certain other parts of the city was as objectionable as in the district in which petitioner had his establishment.

The case, therefore, is in no way analogous to those in which an ordinance, although, perhaps, fair upon its face, has been set aside because of a showing that it was administered in such a manner as to discriminate unjustly against a particular race. (*Yick Yo v. Hopkins*, 118 U. S. 356), or because the facts surrounding the adoption of the ordinance showed that its real purpose was not to protect the public welfare but to deprive a specific individual of the right to use his property in a lawful way. (*Dobbins v. Los Angeles*, 195 U. S. 223.) The facts before us would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what

it purported to be, viz., a legitimate regulation, operating alike upon all who come within its terms.

The writ is discharged and the petitioner remanded to the custody of the chief of police of the city of Los Angeles.

SLOSS, J.

We concur:

ANGELLOTTI, J.
SHAW, J.
HENSHAW, J.
LORIGAN, J.
MELVIN, J.

71 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Petition for Writ of Error.

To the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California:

The petition of J. C. Hadacheck respectfully shows that heretofore, to wit: on the twenty-fifth day of October, 1912, he was imprisoned, restrained, detained and confined of his liberty by C. E. Sebastian, Chief of Police of the City of Los Angeles, a municipal corporation organized and existing under and by virtue of the constitution and laws of the State of California, and situated in the County of Los Angeles, State of California; that the said imprisonment, restraint, detention and confinement were illegal and that the said illegality thereof consisted in this, to wit: that the only pretext or cause of the arrest of your petitioner or of his imprisonment, restraint, detention or confinement, was by virtue of a warrant issued out of the Police Court of the said City of Los Angeles upon a complaint filed therein on the twenty-fourth day of October, 1912, charging that your said petitioner, J. C. Hadacheck, did, on the twenty-fourth day of October, 1912, in the City of Los Angeles, in the County of Los Angeles, State of California, commit a misdemeanor, in that he did willfully and unlawfully establish, conduct, operate and maintain a brickyard, brickkiln, and establishment, factory and place for the manufacture and burning of brick within that certain portion of the City of Los Angeles described in Section 1 of Ordinance No. 19,989, (New Series), of the City of Los Angeles.

Your petitioner alleges that at all times subsequently to the nineteenth day of March, 1902, he has been and was at the time of filing the said petition for a writ of habeas corpus, the owner in fee and in possession of a certain piece or parcel of real property situated in the said City of Los Angeles, County of Los Angeles, State of California, containing about eight acres of land

and fully and particularly described in the aforesaid petition for a writ of habeas corpus.

Your petitioner further alleges that the aforementioned piece or parcel of real property is situated within that certain district referred to in the aforesaid complaint filed in the said Police Court and described in Section 1 of Ordinance No. 19,989, (New Series), of the said City of Los Angeles, which said ordinance was mentioned and referred to in the aforesaid complaint.

Your petitioner further alleges that there is located upon the aforesaid piece or parcel of real property, an extremely valuable bed of clay, which said clay is of very great value for the manufacture of brick of a fine quality, and that the said real property hereinbefore referred to is worth to your petitioner not less than one hundred thousand (\$100,000) dollars per acre, or about eight hundred thousand (\$800,000) dollars for the entire tract, for brickmaking purposes, and that the said real property is of comparatively small value, not to exceed sixty thousand (\$60,000) dollars, to your petitioner, or to any other person for residence purposes or for any purpose other than the purpose of manufacturing brick as aforesaid; that your petitioner has used the said property at all times subsequently to the said nineteenth day of March, 1902, and was at the time of filing the said petition for a writ of habeas corpus, using the same for the purpose of manufacturing brick of a very high grade, and that in his said operations thereon he has made excavations to a considerable depth and covering a very large area of the said property, and that on account of the said excavations the said property cannot be utilized

by your petitioner or by any other person for residence purposes, or for any purpose other than that for which the same was being used at the time of filing the said petition for a writ of habeas corpus.

Your petitioner further alleges that if the said excavations had not been made in the said tract of land, the value of the said real property for residential or other purposes would not have been more than one tenth of the value of the same for brickmaking purposes, by reason of the fact that the said tract of land contains a bed of extremely valuable clay as hereinbefore set forth, of a kind that can be found only in a very few places in or about the said City of Los Angeles, and of a kind difficult to be found in any location where the same can be utilized for the purpose of the manufacture of brick.

Your petitioner further alleges that he purchased the said real property because of the said valuable bed of clay thereon, and that he purchased the same for the express purpose of manufacturing brick from the said clay situated thereon and for no other purpose, and that he would not have purchased the said land if the said clay had not been situated thereon.

Your petitioner further alleges that, at the time of the purchase of the said real property by your petitioner as aforesaid, on or about the nineteenth day of March, 1902, the said real property was situated outside of the corporate limits or boundaries of the aforesaid City of Los Angeles and distant from any dwellings or any habitations, and your petitioner purchased the said property for the reason

that he believed that he would be permitted to utilize the clay upon the said property and would be permitted to manufacture and burn brick thereon without hindrance or molestation of any kind whatsoever, and that your petitioner did not expect or believe, nor did any other person owning property adjacent to or in the vicinity of the hereinbefore described real property expect or believe that the said territory would ever be annexed to the City of Los Angeles, or that
74 the operation and maintenance of the said brickyard or the manufacture of brick on the said property would ever be interfered with in any manner by the said city, or by any other public corporation, or in any manner whatsoever.

Your petitioner further alleges that, as hereinbefore set forth, the aforesaid real property was purchased by your petitioner for the purpose of being utilized by him as a brickyard and as a place for the manufacture and burning of brick and was purchased by him because of the extremely valuable bed of clay upon the said property; that since the said real property was purchased by your petitioner, brick in large quantities and of a very fine quality have been and were at the time of the filing of the aforesaid petition for a writ of habeas corpus, being manufactured thereon from the clay composing the said real property, and that the said brick had been and at the time of the filing of the said petition, were being used for building purposes in and about the said City of Los Angeles.

Your petitioner further alleges that, subsequently to the said nineteenth day of March, 1902, your petitioner proceeded to and did erect upon the said real property brickmaking machinery of modern type and design, and did erect necessary office and other buildings, together with a boiler room and such other improvements as your petitioner deemed necessary in the carrying on of a modern brick manufacturing business, and that your petitioner has expended in the aggregate a sum not less than twenty-five thousand (\$25,000) dollars in making the aforesaid improvements and in constructing the aforesaid buildings and in purchasing and in placing upon the said real property brickmaking machinery as aforesaid.

Your petitioner further alleges that during the month of October, 1909, at an annexation election held for that purpose, the territory in which the aforesaid real property is situated, was annexed to the said City of Los Angeles and that ever since the said month of October, 1909, the said property has been and, at the time of the filing
75 of the said petition for a writ of habeas corpus, was *was* within the corporate boundaries of the aforesaid city.

Your petitioner further alleges that in the month of February, 1910, the City Council of the said City of Los Angeles directed the City Attorney to prepare and present a draft of an ordinance prohibiting the maintenance of brickyards in that portion of the City of Los Angeles described in the pretended ordinance set forth in the aforesaid petition and hereinafter set forth, and that on or about the twenty-second day of March, 1910, the said City Council of the City of Los Angeles did adopt a pretended ordinance known as Ordinance No. 19,989, (New Series), which said pretended ordinance was in words and figures following, to wit:

"*Ordinance No. 19989.*

(New Series.)

An Ordinance Prohibiting the Maintenance of Brickyards in a Certain Portion of the City of Los Angeles.

The Mayor and Council of the City of Los Angeles do ordain as follows:

SECTION 1. It shall be unlawful for any person, firm or corporation to establish, conduct, operate or maintain, or to cause or permit to be established, conducted, operated or maintained, any brickyard or brickkiln, or any establishment, factory or place for the manufacture or burning of brick, within that certain portion of the City of Los Angeles bounded and described as follows, to wit:

Beginning at the intersection of the westerly boundary line of the City of Los Angeles with the center line of Wilshire Boulevard; thence easterly along the center line of Wilshire Boulevard to the center line of Western Avenue; thence southerly along the center line of Western Avenue to the center line of Washington Street; thence westerly along the center line of Washington Street to the westerly boundary line of the City of Los Angeles; thence northerly following the various courses of the said boundary line to the place of beginning.

76 SEC. 2. It shall be unlawful for any person, firm or corporation to conduct, operate or maintain, or to cause or permit to be conducted, operated or maintained, any brickyard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick, established prior to the passage of this ordinance, within that portion of the City of Los Angeles described in Section 1 of this ordinance.

SEC. 3. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than five (\$5) dollars nor more than two hundred (\$200) dollars, or by imprisonment in the city jail for a period of not more than one hundred (100) days, or by both such fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

SEC. 4. The City Clerk shall certify to the passage of this ordinance and shall cause the same to be published once in The Los Angeles Daily Journal.

I hereby certify that the foregoing ordinance was adopted by the Council of the City of Los Angeles at its meeting of March 22, 1910.

H. J. LELANDE,
City Clerk.

I hereby certify that the foregoing ordinance was presented to the Mayor for his approval and signature March 24, 1910, and was returned by the Mayor with his objections thereto in writing April 2, 1910; and that the said ordinance, together with the Mayor's said objections thereto, was laid before the Countil at its meeting of April 5, 1910, and that at said meeting said ordinance was re-adopted notwithstanding the objections of the Mayor by the following
77 vote:

Ayes: Messrs. Andrews, Botkouski, Gregory, Lusk,
O'Brien, Washburn and Williams (7).

Noes: None.

H. J. LELANDE,
City Clerk."

Your petitioner further alleges that thereafter, to wit: on or before the twenty-fourth day of March, 1910, the aforesaid pretended ordinance was presented to the Mayor of the said city for his approval, but that the said pretended ordinance was not approved by the said Mayor but thereafter, to wit: on the second day of April, 1910, the said pretended ordinance was vetoed by the Mayor of the said city and was returned by the said Mayor to the said City Council with his objections thereto, in writing, in words and figures following, to wit:

"I return herewith, without my approval, an ordinance passed by your honorable body March 22, 1910, prohibiting the operation of brickyards in the district bounded by Washington, Wilshire, Western Avenue and the western city limits for the following reason:

There are in this district, already established at least two brick-yards. This ordinance goes into effect thirty days from its passage and approval. Where a business, in itself lawful, has been established and a large amount of money invested therein, the owners thereof should be given a reasonable length of time within which they may close up their business or remove the same from the district within which it is proposed to prohibit the conducting of such business. Thirty days would seem to be entirely too short a period in a case of this kind. I would respectfully suggest that your honorable body pass an ordinance along similar lines providing that after a date in the future, to be fixed by said ordinance, the operation of brick-yards be prohibited in said district."

Your petitioner further alleges that thereafter and on the
78 fifth day of April, 1910, the said pretended ordinance, together with the said objections of the Mayor thereto was laid before the said City Council at its meeting and the said pretended ordinance was on the same day adopted by the said City Council notwithstanding the said objections of the said Mayor, and that thereafter and on the sixth day of April, 1910, the said pretended ordinance was published in the Los Angeles Daily Journal, a newspaper of general circulation published in the said city and thereafter, to wit: on the fifth day of May, 1910, pursuant to the provisions of the City Charter of the said City of Los Angeles, the said pretended ordinance became effective if the same was or is a valid ordinance,

and was at the time of the filing of the petition for a writ of habeas corpus herein, in full force and effect according to its terms if the same was or is valid and if the said pretended ordinance was or is a valid exercise of the police power of the said city and that the said pretended ordinance has not been in any manner repealed or amended.

That your petitioner attached to his said petition for a writ of habeas corpus a map of the said City of Los Angeles, which said map was marked "Exhibit A" and was referred to and made a part of the said petition, and that on the aforesaid map the district described in the aforesaid pretended ordinance was shown and the boundaries thereof were delineated by red lines.

Your petitioner further alleges that the real property belonging to your petitioner and hereinbefore referred to and fully described in the said petition for a writ of habeas corpus is situate within the district described in the aforesaid pretended ordinance, wherein the maintenance of a brickyard and the manufacture and burning of brick are declared to be unlawful, and that if the aforesaid pretended ordinance is held to be valid and in force and is held to have been valid and in force at the time of the arrest of your peti-

tioner as aforesaid, your petitioner will be compelled to dis-
79 continue and abandon entirely his business of manufacturing
and burning brick, and that your petitioner's said business
will be completely destroyed and that your petitioner will be
deprived of his occupation and business and of his said property
and of the use of his said property; that your petitioner is and will
be unable, for the reasons herein stated and stated in the aforesaid
petition for a writ of habeas corpus, to use the said property for
any other purpose than that for which the same is now being used
and was being used at the time of the filing of the said petition for
a writ of habeas corpus and, therefore, if the said pretended ordinance
is enforced your petitioner will be entirely deprived of his
said property and of the use thereof.

Your petitioner further alleges that the business of manufacturing brick must necessarily be conducted and carried on at the place where suitable clay is found and that the clay cannot be transported to and used at a location other than the place at which the same is found; that, as hereinbefore fully set forth and as fully set forth in the said petition for a writ of habeas corpus, the bed of clay situated upon the premises belonging to your said petitioner and described in the said petition and hereinbefore described, is of a particularly fine quality, and clay of as good a quality as that upon your petitioner's said property cannot be found at any other place within the City of Los Angeles where the same could be utilized for the purposes of manufacturing brick; that by reason of the said facts your petitioner alleged in the said petition and now avers that the aforesaid pretended ordinance is invalid, null and void in that the same amounts to and is a confiscation of the said property of your petitioner, and that your petitioner, if the said pretended ordinance is enforced, will be entirely deprived of his said property and

80 of the use thereof, and that your petitioner cannot obtain any compensation whatsoever therefor.

Your petitioner further alleges that within the district described in the aforesaid pretended ordinance, the brickyard belonging to your petitioner and one other brickyard, to wit: the brickyard belonging to Hubbard & Chamberlain Brick Company, were situated at the time of the filing of the said petition for a writ of habeas corpus, and that there were not at the time of filing the said petition, and were not at the time of the passage of the said pretended ordinance, any brickyards or brick manufacturing plants within the aforesaid district other than that of your petitioner, and that of the said Hubbard & Chamberlain Brick Company.

Your petitioner further alleges that there was or is no lawful or just reason for prohibiting the manufacture of brick or the maintenance of a brickyard within the district described in the aforesaid pretended ordinance, or at the place where your petitioner's said property is situated; that the maintenance of the said business cannot be and has not at any time been, and was not at the time of the filing of the said petition, and is not in the nature of a nuisance as defined in Section 3479 of the Civil Code of the State of California, and cannot be and is not and will not be dangerous or detrimental to the health or to the morals or to the safety or to the peace or to the welfare or to the convenience of any of the inhabitants of the said district, or of the said city; that in the maintenance and carrying on of the said brickmaking business, your petitioner has always complied and at the time of filing the said petition was complying with all of the laws of the State of California and with all of the regulations and ordinances of the said City of Los Angeles, except the said pretended ordinance hereinbefore set forth which said pretended ordinance your petitioner claims and alleges in the said petition to be invalid for the reasons set forth in the said petition and herein set forth, and which said pretended ordinance

81 your petitioner alleges that he cannot comply with or obey without suffering entire and complete less and destruction of his said business as aforesaid, and without suffering great loss in the value, to wit: practically the entire value of his said real property, for which loss, damage and injury your petitioner has no speedy or adequate or other remedy at law.

Your petitioner further alleges that the said brickyard belonging to your petitioner and situated upon the real property described in the said petition, is kept in a clean and sanitary condition and that the said business of the manufacture of brick upon the said premises is and has been at all times, so conducted that there is no disturbance of the peace, quiet or enjoyment of any person residing in the community; that there is and has been no danger or menace to the health, safety or comfort of citizens resulting therefrom, nor does the maintenance of your petitioner's said business interfere with the comfortable enjoyment of life or of property by or of any person whomsoever; that there are and have been no nuisances arising from the maintenance or operation of the said business causing disturbance or discomfort to any person and that no noxious odors

arise or have arisen from the said brick manufacturing plant; that oil is and has been used exclusively in the burning of the brick-kilns on the said property, and that at all times while a kiln is being burned, the same is entirely covered and enclosed by a metal hood upon the top of which is attached a smoke stack about seventy-five (75) feet in height and that owing to the situation of the said brickyard and by reason of the use of the said hood and of the said smoke stack, an extremely small amount of smoke is emitted from any kiln while the same is being burned; that such little smoke as is emitted therefrom arises through the said smoke stack and is dissipated in the air to such an extent that the same does not disturb the peace, quiet or enjoyment of any person and is not a nuisance or a menace in any manner whatsoever; that your petitioner burns and

has burned in the said brickyard about seven (7) kilns of
82 brick between the months of May and November of each year, and during the other months of the year, no brick are or have been burned upon the said property and the said property is and has been used only for the storage and sale of brick already burned and that only about five (5) days are or have been consumed in burning each kiln of brick.

Your petitioner further alleges that during the period of more than seven (7) years during which he conducted and operated the said brickyard and brick manufacturing plant prior to the annexation of the said territory to the said City of Los Angeles, as aforesaid, no complaints whatsoever were ever made by any person concerning the said brickyard or the said brick manufacturing plant or concerning the operation thereof, and that no attempt of any kind whatsoever was ever made to regulate or to prohibit the operation of the said plant prior to the annexation of the said territory to the said City of Los Angeles.

Your petitioner further alleges that the aforesaid City of Los Angeles is a large city and embraces about one hundred seven and sixty-two one hundredths (107.62) square miles in area and contains many select and beautiful residence sections; that more than seventy-five per cent (75%) of the area of the said city is devoted to residence purposes; that the said district described in the aforesaid pretended ordinance within which the manufacture of brick and the maintenance of brickyards is attempted to be made unlawful, is small and includes only about three (3) square miles and is sparsely settled; that the said district contains large tracts of unsubdivided and unoccupied land.

Your petitioner further alleges that the boundaries of the aforesaid district were determined upon by the City Council of the said city and were fixed in and by the aforesaid pretended ordinance for the sole and specific purpose of prohibiting and suppressing the
83 operation and maintenance of the brickmaking business of your petitioner and of the brickmaking business of the aforesaid Hubbard & Chamberlain Brick Company, whose place of business at the time of the filing of said petition for a writ of habeas corpus was situated in close proximity to your petitioner's said property.

Your petitioner further alleges that within the aforesaid city there are, and were at the time of the adoption of the aforesaid pretended ordinance by the said City Council, many other districts in extent equal to, and many in extent greater than that described in the said pretended ordinance within which other districts the erection, maintenance and operation of brickyards and brick manufacturing plants were and are detrimental to the inhabitants thereof to the same extent or to a greater extent than is the maintenance and operation of brickyards and brick manufacturing plants in the aforesaid district described in the said pretended ordinance, and that within the said districts there are now, and were at the time of the adoption of the aforesaid pretended ordinance, in existence and operation, numerous other brickyards and places where brick, at the said time and at the time of the filing of the petition for a writ of habeas corpus herein, were being manufactured, equally as detrimental as or more detrimental than your petitioner's said brickyard to the inhabitants of the said city, and that there was and is no more reason for the suppression or prohibition of your petitioner's said business than there is or would be for the suppression or prohibition of the business of other persons, firms and corporations carrying on the brick manufacturing business in other portions of the said city, and particularly the brick manufacturing plants mentioned in this petition and in the petition for a writ of habeas corpus herein, other than that of your petitioner.

Your petitioner further alleges that a brick manufacturing plant belonging to Southern California Brick Company, is and was at the time of the filing of the petition for a writ of habeas corpus

herein, situated on the north side of Stephenson Avenue,
84 east of Soto Street; that a brick manufacturing plant belonging to Los Angeles Brick Company is and was at the time of filing the said petition situated on the southerly side of Seventh Street about one block west of Boyle Avenue; that a brick manufacturing plant belonging to Simons Brick Company is and was at the time of filing the said petition situated on the westerly side of Boyle Avenue and on the northerly side of Hollenbeck Avenue; that a brick manufacturing plant belonging to Standard Brick Company is and was at the time of filing the said petition situated between south Soto Street and the Los Angeles River; that all of the aforesaid brick manufacturing plants are in that portion of the said City of Los Angeles commonly known as Boyle Heights; that the aforesaid portion of the city is and was at the time of filing of said petition thickly built up with residences; that in close proximity to the aforesaid brick manufacturing plants are the residences of many hundred people, and is situated an orphans' home in which more than one hundred children are cared for, and also a home for aged people where a large number of people reside; that Hollenbeck Park, a large public park belonging to the said city and devoted to recreation purposes is situated a short distance from the aforesaid brickyards; that the aforesaid portion of the said city adjacent to the said brickyards is improved and is being rapidly and more greatly improved with homes and other improvements;

that the said brickyards were established many years prior to the adoption of the said pretended ordinance, and have been continuously operated since their establishment.

Your petitioner further alleges that the brick manufacturing plant and business of your petitioner does not and did not create any greater discomfort and is not and was not any more of a nuisance and is not and was not any more detrimental to the property located, or to the persons residing in the vicinity thereof, than the hereinbefore mentioned brick manufacturing plants situated in

that portion of the said city known as Boyle Heights are and
85 were to the property located, or to the persons residing in
the vicinity of the said last mentioned plants.

Your petitioner further alleges that on or about the eleventh day of October, 1910, a petition signed by several hundred persons residing in the vicinity of the aforesaid brick manufacturing plants that are situated in that portion of the said city known as Boyle Heights, was filed with the City Council of the said City of Los Angeles, and that the said petition and the said persons signing the same requested that the aforesaid brickyards and brick manufacturing plants be declared to be a public nuisance and a menace to the health of the inhabitants of the said city, and requested that an ordinance be adopted prohibiting the further maintenance and operation of any of said brick manufacturing plants; that the said petition stated that when the kilns located in the said yards were being burned they expelled and threw off large volumes of smoke, cinders and noxious gases which settled over a large territory in the vicinity of the said brickyards and that the said smoke, cinders and noxious gases were injurious to the health and comfort of the residents of the said portion of the said city. That, subsequently, the said petition was considered by the said City Council of the said city and by the Legislative Committee of the said City Council, but that no ordinance or other regulation has ever at any time been adopted or made, and that no action of any kind whatsoever has ever at any time been had or taken by the said City Council, or by the said city or by any officer, board or commission thereof for the purpose of suppressing or prohibiting or regulating, or in any manner interfering with the operation of the aforesaid brick manufacturing plants in the said portion of the said city known as Boyle Heights, and that the said plants have at all times been operated and are now being operated without hindrance or molestation or regulation of any kind whatsoever by the said city, or by any officer, board, commission or employe thereof.

86 Your petitioner further alleges that the brickyard and brick manufacturing plant belonging to the Los Angeles Brick Company is situated near the intersection of Mission Road and Marengo Street in the aforesaid city; that in close proximity thereto are situated the residences of a large number of people, and very near thereto is also situated the County Hospital belonging to and maintained by the County of Los Angeles, in which hospital several hundred patients and injured persons are at all times cared for, treated and maintained; that the operation and maintenance of the said brick manufacturing plant is as great a detriment to the

persons living in the vicinity thereof and to the persons maintained in the said hospital as the plant maintained by your petitioner is to the persons residing in the vicinity thereof, but that no effort of any kind, either by ordinance or otherwise, has ever at any time been made by the said City of Los Angeles, or by any officer, board or commission of the said city to suppress or to prohibit or to regulate the operation and maintenance of the said last mentioned brickyard and brick manufacturing plant.

Your petitioner further alleges that, situated in the said City of Los Angeles, there are and were at the time of filing the petition for a writ of habeas corpus herein, brickyards and brick manufacturing plants other than those hereinbefore mentioned; that the said other brickyards and brick manufacturing plants are situated in close proximity to residences and are in all respects as great a detriment to persons living in the vicinity thereof as the plant maintained by your petitioner is to the persons residing in the vicinity thereof, but that no effort of any kind, either by ordinance or otherwise, has ever at any time been made to suppress or to prohibit or to regulate the operation or maintenance of the same.

Your petitioner further alleges that all of the other brickyards and brick manufacturing plants mentioned or referred to in this

petition and in the petition for a writ of habeas corpus herein
87 except the brickyard and plant of your petitioner and that
of the said Hubbard & Chamberlain Brick Company, are
in that portion of the said City of Los Angeles which constituted
the said city prior to the annexation of the territory aforesaid in
October, 1909.

Your petitioner further alleges that your petitioner's said brickyard and brick manufacturing plant are in all respects similar and are operated in a manner in all respects similar to the brickyards and brick manufacturing plants mentioned in this petition and in the petition for a writ of habeas corpus herein, other than your petitioner's said brickyard and plant, and that the brick manufacturing plants, and the operation thereof, of other persons, firms and corporations in the said city are not in any way distinguishable from that of your petitioner.

Your petitioner further alleges that no ordinance or regulation of any kind whatsoever has ever at any time been adopted by the said City of Los Angeles regulating or attempting to regulate the manufacture of brick or the manner of conducting or operating brick kilns or brickyards or places for the manufacture or burning of brick, and that no attempt has ever been made by the said City of Los Angeles or by any officer, board or commission thereof to regulate the same, and no attempt has ever been made by the said city or by any officer, board or commission thereof to determine whether or not brickyards or brickkilns or brick manufacturing plants can be conducted or operated without creating or being a nuisance or without creating or being a menace to the peace, health, safety, quiet or enjoyment of persons residing within the said city.

Your petitioner further alleges that in the sale of the brick manufactured by him upon the said premises hereinbefore referred to,

and in the operation of his said brick manufacturing plant, he enters into direct competition with each and every of the owners of those certain brick manufacturing plants mentioned in this petition other than the plant owned by your petitioner.

88 Your petitioner further alleges that the boundaries of the aforesaid district described in the said pretended ordinance are not determined by any natural or geographical lines or objects and are not determined with regard to the conditions of the population or inhabitants of the said City of Los Angeles, nor as to whether the said district or any other portion of said city is densely or sparsely settled and populated, nor as to any other conditions existing in or about the aforesaid district or in or about any other portion of the said city.

Your petitioner further alleges that the business carried on by your petitioner upon his said premises is a lawful, useful and necessary business; that none of the materials used or manufactured on the said premises by your petitioner are combustible and that there is no risk or danger from fire. That all of the machinery now in place or hereafter to be placed therein is and will be of the most approved pattern and in accordance with the latest and best devices and improvements known in the manufacture of brick; that the said business of your petitioner can be and will be operated and maintained by him by the use of the said devices and improvements and the said machinery contained therein so that the said business and the said plant will not create or be a nuisance, and will not interfere in any manner whatsoever with the peace, health, safety, comfort, convenience or welfare of the inhabitants of the said district or of any other portion of the said city.

Your petitioner further states that the aforesaid pretended ordinance is invalid, null and void in this, that the business of manufacturing, burning and selling brick is not a nuisance per se, as defined by the statutes of the State of California, or at all, nor is the said business of your petitioner carried on or operated in such a manner as to create or to be a nuisance in any respect or in such manner as to be dangerous to the peace, health, safety, comfort,

convenience or welfare of the persons residing in the said 89 district or in any other portion of the said City of Los Angeles;

that the said pretended ordinance attempts arbitrarily to create a sò-called residence district and to prohibit therein the carrying on of a proper and lawful business and to prevent property owners therein from making a lawful use of their property, and particularly to prevent your petitioner from making a lawful use of his said property, thereby making an unwarranted and unlawful discrimination against your petitioner and denying to him the use of his said property for a lawful purpose.

That, pursuant to the aforesaid warrant issued out of the said Police Court of the said City of Los Angeles, your petitioner was, at the time of the issuing of the writ of habeas corpus herein, in the custody of the said Chief of Police of the said City of Los Angeles, and your petitioner was held by the said Chief of Police in viola-

tion of the provisions of the Constitution of the State of California and of the United States of America, as he was advised.

That thereupon your petitioner, being still in the custody of the said C. E. Sebastian, Chief of Police of the said City of Los Angeles as aforesaid, on the twenty-fifth day of October, 1912, filed a petition in this honorable Supreme Court of the State of California for a writ of habeas corpus wherein in the petition therein filed, your petitioner set forth all of the facts hereinbefore set forth, which said facts your petitioner alleged in the said petition for writ of habeas corpus and now alleges to be true.

That your petitioner in and by the said petition by him filed in the said Supreme Court on the said twenty-fifth day of October, 1912, sought to have declared and determined that the said complaint upon which your petitioner was charged, did not state a public offense in this: that the said pretended ordinance known as Ordinance No. 19,989, (New Series), and hereinbefore set forth, was void and invalid and was in violation of the provisions of the Constitution

of the State of California and of the provisions of the four-
90 tenth amendment of the Constitution of the United States

in that it was an attempt on the part of the said City of Los Angeles to make and enforce a law that abridged and abridges the privileges and immunities of citizens of the United States in that it attempts to prohibit the establishment, conduct, operation or maintenance of any brickyard or any brikkiln or any establishment, factory or place for the manufacture or burning of brick within that portion of the said city described in the said pretended ordinance and that the said business of establishing, conducting, operating and mainatining brickyards, brikkilns and establishments, factories and places for the manufacture and burning of brick was and is not a nuisance, but was and is a lawful, useful and necessary occupation and was and is protected by the provisions of the Constitution of the State of California.

That your petitioner in and by the said petition filed by him in the said Supreme Court as aforesaid, sought to have declared and determined that the said complaint upon which your petitioner was charged, did not state a public offense in this: that the said pretended ordinance hereinbefore set forth was void and invalid as against the vested rights acquired by your petitioner prior to the time when the aforesaid real property belonging to your petitioner was brought within the corporate limits of the said City of Los Angeles by annexation proceedings as aforesaid, and prior to the adoption of the aforesaid pretended ordinance (if the said pretended ordinance should be held to be a valid ordinance), by the purchase by your petitioner of the property hereinbefore referred to at a place where it was lawful at the time of the said purchase to establish, conduct, operate and maintain brickyards and brikkilns and establishments, factories and places for the manufacture and burning of brick and by the work preformed by your petitioner and in his behalf upon the premises aforesaid and by the expenditure by your petitioner of large sums of money, as hereinbefore set forth,
91 in the purchase, erection and construction of his said brick-making machinery, buildings, boiler rooms and other im-

provements; and that by reason of the premises aforesaid, the said pretended ordinance was in violation of the fourteenth amendment of the Constitution of the United States prohibiting any state from making or enforcing any law abridging the privileges and immunities of any citizen of the United States, or depriving any person of liberty or property without due process of law.

That your petitioner in and by the aforesaid petition filed by him in the Supreme Court of the State of California as aforesaid, sought to have declared and determined that the said pretended ordinance hereinbefore set forth was invalid, null and void and was in violation of the fourteenth amendment of the Constitution of the United States in this: that it attempted to abridge the privileges and immunities of your said petitioner who was a citizen of the United States in that it purported to prevent the establishment, conduct, operation or maintenance of brickyards, brickkilns, and establishments, factories or places for the manufacture and burning of brick, and did not seek or purport to regulate or control the manner or method in which such brickyards or brickkilns or establishments, factories or places for the manufacture or burning of brick may, might or should be erected, maintained, conducted or operated, and in that the said pretended ordinance purported to prohibit the establishment, conduct, operation or maintenance of brickyards and brickkilns and establishments, factories and places for the manufacture and burning of brick, and did not seek or purport to regulate the manner in which brickyards or brickkilns might or should be conducted, maintained or operated, or the manner in which brick might or should be manufactured or burned.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that the said pretended ordinance was in violation of the said fourteenth amendment of the Constitution of the United States in that the same was an attempt on the part of the said City of Los Angeles to make and enforce a law that abridged the privileges and immunities of citizens of the United States and particularly of your petitioner who was a citizen as aforesaid, in that the said pretended ordinance attempted to prohibit the establishment, conduct, operation or maintenance of brickyards and brickkilns and establishments, factories and places for the manufacture and burning of brick within the aforesaid district, and that the said business aforesaid was not a nuisance but was a lawful, useful and necessary occupation and was protected by the provisions of the Constitution of the State of California.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that the aforesaid pretended ordinance was void and invalid and was in violation of the provisions of the Constitution of the United States as against your petitioner and as against any other person employed by or on behalf of your petitioner in the establishment, conduct, operation or maintenance of the brickyard and brick manufacturing plant upon the

premises belonging to your petitioner and hereinbefore described, in that the same was in violation of the several rights acquired by your petitioner prior to the date of the annexation of the aforesaid territory to the City of Los Angeles, and prior to the adoption of the aforesaid pretended ordinance.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that the said pretended ordinance was void and invalid and was in violation of the provisions of the Constitution of the State of California, and of the Constitution of the United States, in that the same was un-

reasonable, and if the same was enforced, fostered and would
93 foster a monopoly and protected and would protect persons,

firms and corporations engaged in a like business to that engaged in by your petitioner in the enjoyment of the monopoly of the business of manufacturing brick in the said city, and discriminated and would discriminate against your petitioner, and prevented and would prevent your petitioner from conducting, operating and maintaining his said brickyard and brick manufacturing plant, and prevented and would prevent your petitioner from entering into competition with the other persons, firms and corporations named in the said petition for a writ of habeas corpus who were engaged in the same business as your petitioner as alleged herein and in the said petition for a writ of habeas corpus.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that by reason and by virtue of the purchase of the real property belonging to your petitioner as aforesaid, and by reason and by virtue of the establishment, operation and maintenance of his said brickyard and brick manufacturing plant thereon at a place and at a time when it was lawful so to do and not contrary to the provisions of any ordinance or of any pretended ordinance of the said city, and by reason and by virtue of the expenditure by your petitioner of large sums of money expended by him in and about the said business as hereinbefore set forth, he had the right to continue the conduct, operation and maintenance of his said brickyard and brick manufacturing plant upon the premises so purchased and owned by him as aforesaid, and hereinbefore referred to, and had the right to continue to possess the aforesaid property and the rights so acquired as aforesaid without hindrance, opposition, or interference from or by the aforesaid City of Los Angeles, or from or by any of its officers, agents or employes.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that the aforesaid pretended ordinance was void and invalid and was in violation of the provisions of the Constitution of the State of California and of the fourteenth amendment of the Constitution of the United States in that the same was unreasonable and in that the enforcement thereof by the City of Los Angeles and by the authorities thereof, fostered and would foster a monopoly in the manufacture

of brick in the said city, and discriminated and would discriminate against your petitioner, and prevented and would prevent your petitioner from conducting, operating and maintaining his said brick-yard and brickkiln and his said establishment, factory and place for the manufacture and burning of brick and prevented and would prevent your petitioner from entering into competition with the other manufacturers of brick named in this petition and in the said petition for a writ of habeas corpus, and that the said pretended ordinance was and could be enforced and was and could be made to operate, and was directed and was meant to be directed only against your petitioner herein and against no other person, firm or corporation whatsoever.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that the said pretended ordinance denied to your petitioner and to other property owners in the said district, the lawful use of his and their property in violation of the provisions of the Constitution of the State of California and of the Constitution of the United States; that the said pretended ordinance was an unlawful exercise by the said City of Los Angeles of its police powers; that there was no just or inherent reason for prohibiting the manufacture of brick for the maintenance of a brickyard in the district described in the said pretended ordinance, while at the same time, permitting the manufacture of brick and the maintenance of brickyards in other sections of the

city and particularly in those portions of the said city hereinbefore referred to wherein other brick manufacturing

plants and brickyards were permitted to be maintained; that the aforesaid pretended ordinance attempted to prohibit within the said district the prosecution of a lawful business and did not purport to regulate in any manner the conduct of any business; that the said pretended ordinance amounted to and was an oppressive, unreasonable and unjust interference with and invasion of the use of private property by your petitioner for a lawful purpose in that the said business of the manufacture of brick carried on by your petitioner on the property hereinbefore referred to was a lawful, useful and necessary business, and that the enforcement of the said pretended ordinance would entirely suppress the said business and would prohibit your petitioner from conducting the same as is more fully set forth in this petition and in the said petition for a writ of habeas corpus; that the provisions of the said pretended ordinance were unnecessary for the preservation of the public peace, health, safety, morals, welfare and convenience, or of any thereof, in that the said brickyard and the said brick manufacturing business were not a menace to or an interference with the peace, health, safety, morals, welfare or convenience of the public or of any portion thereof, or of any person or persons residing in the said City of Los Angeles; that the said pretended ordinance did not have uniform operation as to all of the classes upon which it purported to operate in that the said pretended ordinance operated and did at all times operate only as against your petitioner and the said Hub-

bard & Chamberlain Brick Company and the business carried on by them and not as against any of the other brick manufacturers named in this petition, or as against the business carried on by the latter or by any of them; that the said pretended ordinance attempted to provide and enforce restrictions and prohibitions against your petitioner and his said business that were not provided and did not exist by virtue of any law of the State of California or of any ordinance of the said City of Los Angeles with respect to
96 other businesses that were in all respects similar and similarly situated to that of your petitioner, which restrictions and prohibitions were not required for the protection of the public peace, health, safety, morals, welfare or convenience.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that the said pretended ordinance amounted to and was a denial to persons within the said city of the equal protection of the laws in that the same denied to persons owning property within the aforesaid district the right to use the same for the manufacture of brick, while permitting to persons owning property outside of the said district the right to use their said property for the said purposes, and particularly in that the said pretended ordinance denied to your petitioner the right to manufacture brick on his said property and to maintain thereon a brickyard or brickkiln while the other brick manufacturers named in this petition were permitted, without regulation or restriction of any kind whatsoever to manufacture brick on their property and to maintain thereon brickyards and brickkilns even though, as herein alleged, your petitioner's brickyard and brick manufacturing plant were not any greater a nuisance or menace than were the other brickyards and brick manufacturing plants mentioned in this petition.

That your petitioner in and by the aforesaid petition by him filed in the said Supreme Court of the State of California as aforesaid, sought to have declared and determined that the said pretended ordinance and enforcement thereof would deprive your petitioner of his said property without due process of law; that the said pretended ordinance amounted to the taking of your petitioner's said property without due process of law and without due or any compensation; that the said pretended ordinance was and would be retroactive and would deprive your petitioner of property lawfully

97 acquired and lawfully used prior to the adoption of the said pretended ordinance and prior to the annexation of the aforesaid territory to the said City of Los Angeles; that the said pretended ordinance did and would deprive your petitioner of the liberty and right of carrying on a lawful business in a lawful manner and without unreasonable restrictions and deprived and would deprive your petitioner of the opportunity and right of making a beneficial, profitable and lawful use of his said property; that the said pretended ordinance was not a reasonable or a bona fide exercise of the police power of the said City of Los Angeles for the welfare or comfort of the inhabitants of the district described in the said

pretended ordinance or of any other portion of the said city, but that the said pretended ordinance was merely an attempt on the part of the said city, under color of its police power, to create an unjust, arbitrary and unreasonable discrimination against the said brickmaking business in which your petitioner was engaged for the sole and only purpose of causing your petitioner to discontinue his said business, thereby confiscating your petitioner's said property and depriving him of the same without due process of law and without compensation.

And your petitioner prayed that a writ of habeas corpus might be granted, directed to the said C. E. Sebastian, Chief of Police of the said City of Los Angeles, and commanding him to have the body of your petitioner before the Supreme Court forthwith upon the granting of the writ therein prayed, and to receive what should then and there be considered by the said Supreme Court concerning your petitioner, together with the time and the cause of his detention and the said writ, and that your petitioner should be restored to his liberty.

And such proceedings were had upon the filing of the said petition and thereafter, that the said Supreme Court of the State of California ordered that a writ of habeas corpus should duly issue in the said matter returnable before the said Supreme Court of the State of California in banc, on the eleventh day of November, 1912;

that thereafter return was made on the said eleventh day of
98 November, 1912, by the said C. E. Sebastian, Chief of Police of the said City of Los Angeles, that your said petitioner was arrested on the twenty-fourth day of October, 1912, and was held pending arraignment on the charge set forth in the said complaint filed in the said Police Court of the City of Los Angeles, and that, during such time pending arraignment your petitioner was placed in the custody of the said C. E. Sebastian, Chief of Police, as aforesaid; and that while thus in custody, the said petitioner applied for a writ of habeas corpus, which writ was served upon the said C. E. Sebastian, and, obedient to the command endorsed upon the said petition for the writ, the said petitioner was released on bail in the sum of one hundred (\$100) dollars, and that the said petitioner was, at the time of making the said return, at liberty and that the said C. E. Sebastian, Chief of Police as aforesaid, therefore no longer restrained or had custody of your said petitioner.

And your petitioner further shows that your petitioner, in the said petition for a writ of habeas corpus filed by him for the purpose aforesaid, to wit: to secure his liberty from which he was restrained and imprisoned under the alleged charge of violating the aforesaid pretended ordinance known as No. 19,989 (New Series), did claim and contend that the said pretended ordinance was as to the rights of your petitioner by reason of the facts herein set forth and set forth in the said petition for a writ of habeas corpus, invalid, null and void for the reason that the same was in violation of the provisions of the Constitution of the United States prohibiting any state from making and enforcing any law abridging the privileges or immunities of any citizen of the United States, or depriving any

person of liberty or property without due process of law, or depriving any person of property without compensation, or denying to citizens equal protection of the law; and the validity of the aforesaid pretended ordinance of the said City of Los Angeles was drawn in question on the ground that the same was repugnant to 99 the provisions of the Constitution of the United States as aforesaid.

That the said petition for a writ of habeas corpus was, on the eleventh day of November, 1912, heard in banc in the said Supreme Court of the State of California and submitted on briefs thereafter to be filed; that thereafter, briefs were filed by the petitioner and by the respondent in the said proceeding; that thereafter and on the fifteenth day of May, 1913, an order was entered upon the said petition that the said writ should be discharged and that your petitioner should be remanded to the custody of the said C. E. Sebastian, Chief of Police of the City of Los Angeles; and it was adjudged that the said pretended ordinance of the City of Los Angeles hereinbefore set forth was a valid ordinance as against the rights of your petitioner.

Your petitioner further avers that the said judgment of the said Supreme Court discharging the said writ of habeas corpus and remanding your petitioner to the custody of the said C. E. Sebastian, Chief of Police as aforesaid, has become final.

Your petitioner further states that, upon the said petition for a writ of habeas corpus brought by your petitioner, there has been a judgment in the highest court in the State of California in which a decision on the said petition could be had, and that by the said decision there was drawn in question the validity of an ordinance of the City of Los Angeles, to wit: the aforesaid pretended ordinance known as Ordinance No. 19,989 (New Series), passed and adopted by the City of Los Angeles April 5, 1910, and entitled, "An Ordinance prohibiting the maintenance of brickyards in a certain portion of the City of Los Angeles," upon the ground that the said ordinance was repugnant to the Constitution of the United States for the reasons hereinbefore set forth and the decision of the said Supreme Court of the State of California was and is in favor of the validity of the said ordinance.

Your petitioner further alleges that by the said pretended 100 ordinance known as Ordinance No. 19,989 (New Series), of the said City of Los Angeles, the rights secured to your petitioner were violated contrary to the provisions of the Constitution of the United States prohibiting the state from making and enforcing any law abridging the privileges or immunities of any citizen of the United States, or depriving any person of liberty or property without due process of law, or depriving any person of property without compensation, or denying to your petitioner equal protection of the law to that granted to other citizens of the said city.

Your petitioner further alleges that by the said pretended ordinance, the rights secured to your petitioner were violated in that the said pretended ordinance and the enforcement thereof discriminates and will discriminate against your petitioner in the manu-

fature of brick and prevents and will prevent your petitioner from entering into competition with other manufacturers of brick in the said City of Los Angeles, and that the said pretended ordinance operates and was intended to operate solely against your petitioner, and that the same is a denial to persons within the said city of the equal protection of the law and that the said pretended ordinance does not have uniform operation as to all classes upon which the same purports to operate.

Your petitioner further shows that the said C. E. Sebastian, Chief of Police as aforesaid, set forth certain allegations in his said return that your petitioner believed were untrue and that the said C. E. Sebastian attached to his said return affidavits of certain persons, which affidavits also contained statements which your petitioner believed were untrue, and thereafter your petitioner made, served and filed his affidavit denying the said statements; that in and by your petitioner's said affidavit, your petitioner denied the statement contained in the aforesaid return to the aforesaid writ of habeas corpus that the ordinance set forth in the petition for a writ of habeas

corpus herein was a valid and necessary, or a valid or a
101 necessary ordinance for the protection of the peace, health and safety, or of the peace, or health, or safety of the citizens and residents of the City of Los Angeles who resided in the vicinity of the business of the petitioner herein, or of any other citizens or residents of the said city for the reasons set forth in the respondent's said return, or for any other reason, and denied that the business of your petitioner constituted or had constituted a menace to the health or safety or peace or comfort of the said city. By the said affidavit your petitioner stated that the ordinance referred to in paragraph sixteen of the respondent's said return, as Ordinance No. 13,077, (New Series), was passed and adopted in July, 1906 for the purpose of prohibiting the operation of a brickyard situated within the district described in the said last mentioned ordinance, and that by the terms of the said last mentioned ordinance, all persons maintaining brickyards within the said district on the twenty-second day of January, 1906 were not required to remove the same from the said district within two years after the said last mentioned date. By the said affidavit your petitioner further stated that by the terms of the ordinance set out in the petition for a writ of habeas corpus herein, no time was given your petitioner within which to remove his brick manufacturing business and that immediately upon the taking effect of the said ordinance, your petitioner was required by the terms of the said ordinance to remove entirely from the district described in the said ordinance. By the said affidavit your petitioner further stated that the so called residence district ordinance referred to in paragraph sixteen of the respondent's said return, known as Ordinance No. 22,798, (New Series), attempted to prohibit the operation of certain businesses having mechanical power and that the said ordinance did not prohibit the maintenance of any business or the operation of any machine that was operated by means of animal

102 power. In reference to the allegations contained in the said return and in the affidavits attached thereto to the effect that the place of business of your petitioner was located between

two residence streets, your petitioner stated in the aforesaid affidavit that his premises and place of business fronted upon Pico Street and that Pico Street was one of the main business streets of the City of Los Angeles, extending easterly and westerly across practically the entire city, and that practically all of the frontage upon the said Pico Street was devoted to business purposes. By the said affidavit your petitioner denies that the maintenance of his brickyard and brick kilns upon his property constituted, or had constituted a growing or a continuing or any menace to the health, or peace, or safety of the persons residing adjacent thereto, as set forth in the aforesaid return and in the affidavits attached thereto. Your petitioner further stated in the said affidavit that several of the persons whose affidavits were annexed to the respondent's said return, testified against your petitioner in an action in the police court of the City of Los Angeles, in which your petitioner was prosecuted for the violation of the ordinance complained of in this proceeding, and that upon direct examination, such persons testified substantially to the facts set out in their said affidavits, but that upon cross examination, the said persons so testifying, without exception, failed to substantiate the statements made upon direct examination. Your petitioner further stated in the said affidavit that he resided upon the premises upon which his said brick manufacturing establishment was located and that he had never been informed and had never known of any illness being caused in the said locality by reason of any gases, smoke, soot, steam or dust rising from his said brickmaking plant, and that no sickness had ever been caused in his own family thereby, and your petitioner denied that his business was a menace to the health, or to the safety of any person living in the said district or near thereto, and denied that his said business was a constantly, or at all

growing menace by reason of the building up of the said
103 locality, or otherwise, or at all. Your petitioner further de-

nied in his said affidavit that it was impossible to conduct a brickyard in the same close proximity to dwellings as that in which your petitioner's business was located without causing a menace to the health of those living in the said district and without causing a menace or a discomfort or disturbing the peace or quiet or enjoyment of any person, or otherwise, either by reason of the fumes generated by the combustion of the oil used for the burning of brick, or by the smoke and soot from the same source, or by the noise created by the generation of steam, or by the dust created by the passage of wagons over private roadways, or in any manner whatsoever. Your petitioner denied in his said affidavit that within the industrial sections of the city within which brickyards might be maintained without the transgression of any ordinance of the said city, there were beds of clay that might be utilized for brickmaking purposes, and denied that there were any beds of clay within any such industrial districts of the same fine quality as the bed of clay situated upon your petitioner's premises. Your petitioner further stated in his said affidavit that even if such beds of clay existed, as alleged in the said return, your petitioner would be unable to purchase or to utilize the same, and denied that the said industrial sections of the city are the

only portions of the said city that were suitable for the maintenance of brickyards. Your petitioner further denied that by reason of the facts, or by reason of any of the facts set forth in the said return, the said ordinance was a valid or necessary regulation for the preservation of the peace, or health, or safety, or comfort of the residents of the said city, or of the district described in the said ordinance, or of any other portion of the said city, and denied that the said ordinance was enacted or was enforced as a proper or necessary exercise of the police power of the said City of Los Angeles, and denied that the said ordinance was constitutional or valid, or was necessary for

104 the good order of the said city. Referring to the affidavits

attached to the respondent's said return, your petitioner denied that there was or had been created upon his premises smoke, soot, gas or steam in large or in any quantities, and denied that any such elements greatly, or at all, disturbed any of the persons residing in the neighborhood of your petitioner's said business, or caused a serious or any menace to any person or persons whatsoever; your petitioner denied that the metal hood placed by your petitioner about the burning kilns of brick permitted the existence of the same conditions that existed upon the said premises prior to the construction of the said hood; your petitioner denied that the said device did not, to any material extent, lessen the nuisance caused by escaping smoke, steam, gas or soot, and denied that any of the said elements continued to be or were a menace to the health, or to the safety of any person or persons residing in the said locality. Your petitioner denied that upon several or any occasions when he burned brick in the brick kilns upon his said premises, great or any quantities of smoke or steam or soot ever discharged from the said kilns, or surrounded or entered the dwelling of any person adjacent thereto, and denied that soot in large or any quantities frequently, or at all, was distributed upon any premises adjacent to the said brickyard, or that great or any clouds of dust had been blown upon any premises in such a way as to create a nuisance; your petitioner denied that by reason of the said or any conditions existing during the process of burning brick, or at all, the welfare of any family or of any person had been jeopardized, or that the peace, or comfort of any person or persons had been disturbed.

Your petitioner further shows that upon the return of the said writ of habeas corpus by the said C. E. Sebastian, Chief of Police as aforesaid, your petitioner, by the aforesaid affidavit, denied and controverted certain material facts and matters set forth in the said re-

turn, and excepted to the sufficiency thereof and by the said 105 affidavit alleged facts showing that your petitioner's imprisonment and detention were unlawful, and that he was entitled to his discharge; that by the making and filing of your petitioner's said affidavit, issues of fact arose in the aforesaid proceeding; that the Supreme Court of the State of California did not proceed in a summary way, or in any way, or at all, to hear any proof whatsoever in favor of or against the imprisonment or detention of your petitioner, and did not require or compel the attendance of witnesses and did not hear or consider any evidence whatsoever concerning the facts

or matters set forth in the return to the said writ of habeas corpus, and denied by your petitioner in his said affidavit.

Your petitioner further states that the said Supreme Court of the State of California, by rendering its decision and judgment herein discharging the said writ of habeas corpus, and remanding your petitioner to the custody of the said C. E. Sebastian, Chief of Police as aforesaid, denied to your petitioner the right and privilege accorded to him by law of offering evidence concerning the matters set forth in the said return to the writ of habeas corpus herein and controverted by your petitioner in his said affidavit, and evidence against the imprisonment and detention of your petitioner.

And your petitioner further states that the said Supreme Court of the State of California did err in discharging the said writ of habeas corpus and remanding your petitioner to the custody of the said C. E. Sebastian, Chief of Police as aforesaid, without hearing evidence upon the matters set forth in the return to the writ of habeas corpus, and denied and controverted by your petitioner in his said affidavit, and without hearing evidence that your petitioner was ready, able and willing to produce against his imprisonment and detention.

And your petitioner further states that the said Supreme Court of the State of California did err in deciding in favor of the validity of the said pretended ordinance known as Ordinance No. 106 19,989, (New Series), of the City of Los Angeles, and in not deciding that the said ordinance was void as being in violation of the provisions of the Constitution of the United States aforesaid.

Wherefore, your petitioner prays that a writ of error presented herewith from the Supreme Court of the United States to the Supreme Court of the State of California be allowed and such other process as will enable your petitioner to obtain a review of the said petition for a writ of habeas corpus wherein your petitioner is petitioner and plaintiff in error, and the said C. E. Sebastian, Chief of Police of the City of Los Angeles, is respondent and defendant in error, and the correction of the error aforesaid committed by the said Supreme Court of the State of California and for such other and further orders as may be proper.

And for as much as by order of the said Supreme Court your petitioner is remanded to the custody of the said C. E. Sebastian, Chief of Police of the City of Los Angeles as aforesaid, your said petitioner may be tried, convicted and imprisoned in the city jail of the City of Los Angeles for a violation of the said pretended ordinance by virtue of the complaint filed in, and the warrant issued out of the aforesaid Police Court of the City of Los Angeles, and your petitioner cannot have a hearing upon the writ of error herein before the Supreme Court of the United States until after he shall have been tried, convicted and imprisoned for violation of the said pretended ordinance, your petitioner prays that upon the allowing of the writ of error herein your petitioner be enlarged upon recognizance, and your petitioner will ever pray.

G. C. DE GARMO,
EMMET H. WILSON,
Attorneys for Petitioner J. C. Hadacheck.

107 [Endorsed:] Crim. No. 1760. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck, for a Writ of Habeas Corpus. Petition for Writ of Error. Filed Sept. 22, 1913. B. Grant Taylor, Clerk, By A. S. Ramage, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney- for petitioner.

108 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
vs.

C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Order Allowing Writ of Error.

On motion of G. C. De Garmo and Emmet H. Wilson, attorneys for petitioner J. C. Hadacheck, and upon filing a petition for a writ of error and an assignment of errors,

It is Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein, and that the amount of the bond on the said writ of error be and hereby is fixed at Five Hundred Dollars (\$500.00).

And good cause having been shown, it is ordered that the said petitioner be enlarged upon recognizance in the sum of Five Hundred Dollars (\$500.00), pending the hearing and determination of the said writ of error.

Dated this 26 day of September, 1913.

W. H. BEATTY,
*Chief Justice of the Supreme Court
of the State of California.*

109 [Endorsed:] Crim. No. 1760. In the Supreme Court of the State of California. Clerk's Office Copy. In the Matter of the Application of J. C. Hadacheck for a Writ of Habeas Corpus. Order Allowing Writ of Error. Filed Sep. 26, 1913. B. Grant Taylor, Clerk, by A. S. Ramage, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney- for petitioner.

110 UNITED STATES OF AMERICA:

[Seal of the U. S. District Court, Northern Dist. of California.]

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
vs.

C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State
of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ
of Habeas Corpus.

Writ of Error.

The President of the United States to the Honorable the Justices
of the Supreme Court of the State of California, Greeting:

Because in the records and proceedings and also in the rendition
of the judgment of a plea which is in the said Supreme Court of
the State of California before you, or some of you, being the highest
court of law or equity of the said state in which a decision could
be had in that certain matter of the petition of J. C. Hadacheck for
a writ of habeas corpus, petitioner and plaintiff in error, and C. E.
Sebastian, Chief of Police of the City of Los Angeles, respondent
thereto and defendant in error, wherein was drawn in question the
validity of a statute or an authority exercised under the said state
to wit, an ordinance of the City of Los Angeles, on the ground of
their being repugnant to the constitution, treaties and laws of the
United States, and the decision was in favor of such, their validity;
or wherein was drawn in question the construction of a clause of
the constitution, or of a treaty or statute of or commission

111 held under the United States, and the decision was against
the title, right, privilege or exemption specially set up, or
claim- under such clause of the said constitution, treaty, statute or
commission; a manifest error hath happened, to the great damage
of the said J. C. Hadacheck, the plaintiff in error, as by his com-
plaint appears, we, being willing that the error, if any hath been,
should be duly corrected and full and speedy justice done to the
party aforesaid in this behalf, do command you, if judgment be
therein given, that under your seal, distinctly and openly, you send
the record and proceedings aforesaid with all things concerning the
same to the Supreme Court of the United States, together with this
writ, so that you have the same at Washington on the 25th day of
November next, in the said Supreme Court to be then and there
held, that the record and proceedings aforesaid being inspected, the
said Supreme Court may cause further to be done therein to correct
that error what of right and according to the laws and customs of
the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, the 26th day of September, A. D. 1913, and of our Independence the 138th.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court,
Northern District of California,
 By — — —, *Deputy Clerk.*

Allowed by:

W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

I hereby certify that a copy of the foregoing writ of error was on the 26th day of September, 1913, lodged in the clerk's office of the said Supreme Court of the State of California for the said plaintiff in error.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the
State of California,
 By A. S. RAMAGE, *Deputy Clerk.*

112 [Endorsed:] Original. Crim. No. 1760. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck for a Writ of Habeas Corpus. Writ of Error. Filed Sep. 26, 1913. B. Grant Taylor, Clerk, by A. S. Ramage, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney- for petitioner.

113 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
 vs.
 C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State
 of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ
 of Habeas Corpus.

Assignment of Errors.

J. C. Hadacheck, petitioner and plaintiff in error in the above entitled action, having petitioned the Honorable Chief Justice of the Supreme Court of the State of California for an order permitting the said petitioner and plaintiff in error to prosecute a writ of error to the Honorable the Supreme Court of the United States from the final judgment made and entered in the said cause by the said

Supreme Court of the State of California, now, in connection with his writ of error in this cause, assigns the following errors which this petitioner and plaintiff in error avers occurred in the proceedings in and upon the trial of this cause, and particularly in the record herein, and upon which he relies to reverse the judgment rendered and entered herein, and this petitioner and plaintiff in error avers that in the record and proceedings of this cause there is manifest error in this, to wit:

I.

That the Supreme Court of the State of California erred 114 in deciding that the ordinance adopted by the City Council of the City of Los Angeles on the 5th day of April, 1910, and known as Ordinance No. 19,989 (New Series), set forth in the petition for a writ of habeas corpus herein, was not invalid in that the same amounted to and was a confiscation of the property of the petitioner and plaintiff in error.

II.

That the said court erred in deciding that the aforesaid ordinance was not invalid as abridging the privileges and immunities of the said petitioner and plaintiff in error, who is a citizen of the United States.

III.

That the said court erred in deciding that the aforesaid ordinance was not invalid as depriving the petitioner and plaintiff in error of his property without due process of law.

IV.

That the said court erred in deciding that the aforesaid ordinance was not invalid as depriving the petitioner and plaintiff in error of his property without compensation.

V.

That the said court erred in deciding that the aforesaid ordinance was not invalid as an unwarranted interference with the enjoyment of the property rights of the plaintiff in error acquired prior to the adoption of the said ordinance.

VI.

That the said court erred in deciding that the aforesaid ordinance was a valid police regulation, lawfully adopted by the City Council of the City of Los Angeles in the lawful exercise of the police power granted to the said City of Los Angeles by its charter and by the constitution and the laws of the State of California. 115

VII.

That the said court erred in deciding that the aforesaid ordinance was not invalid as denying the petitioner and plaintiff in error the equal protection of the law, and as an unwarranted and unlawful discrimination against the petitioner and plaintiff in error, in that the said petitioner and plaintiff in error by the said ordinance is prohibited from maintaining or operating his business, while competitors whose places of business are situated in all respects similarly to that of the petitioner and plaintiff in error are permitted to operate without hindrance or molestation.

VIII.

That the said court erred in deciding that the aforesaid ordinance was not invalid as denying the petitioner and plaintiff in error the equal protection of the law, and as an unwarranted and unlawful discrimination against the petitioner and plaintiff in error, in that the said petitioner and plaintiff in error by the said ordinance is prohibited from maintaining and operating his business while the maintenance and operation of no other business or occupation is prohibited by the said ordinance within the district described therein, or at any other place.

IX.

That the said court erred in deciding that the aforesaid ordinance was not invalid as denying the petitioner and plaintiff in error the equal protection of the law, and as an unwarranted and unlawful discrimination against the petitioner and plaintiff in error, in that the maintenance of brickyards, brickkilns and establishments for the burning of brick are prohibited in the said district while 116 no other business or occupation of any kind whatsoever is prohibited by the said ordinance within the district therein described, or at any other place.

X.

That the said court erred in not deciding that the matters charged in the complaint filed against J. C. Hadacheck did not constitute a public offense under any ordinance of the City of Los Angeles, or under any law of the State of California, or under any statute of the United States, or by common law.

XI.

That the said court erred in not deciding that by reason of the matters set forth in the petition of J. C. Hadacheck for a writ of habeas corpus and not denied by the respondent in his return, the complaint filed against the said J. C. Hadacheck did not constitute a public offense under any ordinance of the City of Los Angeles, or under any law of the State of California, or under any statute of the United States, or by common law.

XII.

That the said court erred in not deciding that by reason of the matters set forth in the petition of J. C. Hadacheck for a writ of habeas corpus and denied by the respondent in his return, the complaint filed against the said J. C. Hadacheck did not constitute a public offense under any ordinance of the City of Los Angeles, or under any law of the State of California, or under any statute of the United States, or by common law.

XIII.

That the said court erred in not discharging the said J. C. Hadacheck, petitioner and plaintiff in error, from the custody of the defendant in error, C. E. Sebastian, Chief of Police of the 117 City of Los Angeles, upon the return of the writ of habeas corpus herein.

XIV.

That the said court erred in discharging the said writ of habeas corpus upon the return thereof herein, and in remanding the said petitioner and plaintiff in error to the custody of the said C. E. Sebastian, Chief of Police of the said City of Los Angeles.

XV.

That the said court erred in rendering its decision against the said J. C. Hadacheck and in discharging the said writ of habeas corpus and in remanding the said J. C. Hadacheck to the custody of the said C. E. Sebastian, Chief of Police of the said City of Los Angeles, without hearing or taking evidence or proof upon the matters set forth in the petition of the said J. C. Hadacheck for a writ of habeas corpus which were denied by the said C. E. Sebastian in his return to the said writ of habeas corpus.

XVI.

That the said court erred in rendering its decision against the said J. C. Hadacheck and in discharging the said writ of habeas corpus and in remanding the said J. C. Hadacheck to the custody of the said C. E. Sebastian, Chief of Police of the said City of Los Angeles, without hearing or taking evidence or proof upon the matters set forth in the said return of the said C. E. Sebastian to the said writ of habeas corpus and in the affidavits attached thereto, which were denied by the said J. C. Hadacheck in his affidavit filed in response to the said return and in response to the said affidavits attached to the said return.

Wherefore, by the record aforesaid it appears that the judgment of the Supreme Court of the State of California aforesaid 118 was given against the said petitioner and plaintiff in error and did discharge the said writ of habeas corpus and remand

the said J. C. Hadacheck, petitioner and plaintiff in error, to the custody of the said C. E. Sebastian, Chief of Police of the City of Los Angeles, defendant in error, whereas by the law of the land the said judgment of the Supreme Court of the State of California ought to have discharged the said J. C. Hadacheck, petitioner and plaintiff in error, from custody and ought to have restored him to his liberty, and the said decision ought to have been against the validity of the said ordinance of the City of Los Angeles adopted on the 5th day of April, 1910, as aforesaid, and that the said ordinance was repugnant to the constitution of the United States and void, the said plaintiff in error prays that the judgment and decision of the Supreme Court of the State of California may be reversed, annulled and altogether held for naught, and that the said Supreme Court of the State of California may be ordered to enter an order directing the discharge of the said J. C. Hadacheck, petitioner and plaintiff in error, from custody, and that the said petitioner and plaintiff in error may have such other relief as he may be entitled to by reason of his said rights set forth fully in the record of the said cause.

G. C. DE GARMO,
EMMET H. WILSON,
*Attorneys for J. C. Hadacheck, Petitioner
and Plaintiff in Error.*

119 [Endorsed:] Crim. No. 1760. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck for a Writ of Habeas Corpus. Assignment of Errors. Received copy of the within — this — day of —, 191—, — — —, Attorney for — — —. Filed Sept. 22, 1913. B. Grant Taylor, Clerk, by A. S. Ramage, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney for petitioner.

120 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
vs.
C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Citation.

To C. E. Sebastian, Chief of Police of the City of Los Angeles, Respondent and Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Wash-

ington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein J. C. Hadacheck is petitioner and plaintiff in error in this action and you are the respondent and defendant in error therein, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California, this 26th day of September, 1913, and of the Independence of the United States one hundred thirty-eight.

W. H. BEATTY,
*Chief Justice of the Supreme Court
of the State of California.*

121 Due service of the within citation and receipt of a copy of the writ of error mentioned therein this day admitted, and a copy of the same served upon us at the City of Los Angeles, in the County of Los Angeles, State of California, this 30th day of September, 1913.

RAY E. NIMMO,
*City Prosecutor of the City of Los Angeles,
Attorney for Defendant in Error.*

122 [Endorsed:] Original. Crim. No. 1760. In the Supreme Court of the State of California In the Matter of the Application of J. C. Hadacheck, for a Writ of Habeas Corpus. Citation. Filed Oct. 3, 1913, B. Grant Taylor, Clerk. By —— Erb, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney- for petitioner.

123 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
vs.

C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Order Fixing Bond on Application for Writ of Error.

The petitioner and plaintiff in error, J. C. Hadacheck, having this day filed his petition for a writ of error from the decision and judgment made and entered herein to the Supreme Court of the United States, together with an assignment of errors, within due time, and also praying that an order may be made fixing the amount of se-

curity which the petitioner and plaintiff in error should give and furnish upon the said writ of error, and that pending the said writ of error the said petitioner and plaintiff in error might be enlarged upon recognizance, and the said petition having this day been granted and the said writ of error duly allowed:

Now, therefore, it is ordered that the bond to be given by the said petitioner and plaintiff in error, J. C. Hadacheck, upon the said writ of error, and the amount thereof, is hereby fixed at the sum of Five Hundred Dollars (\$500.00), and the said petitioner and plaintiff in error shall file with the clerk of the said court a good and sufficient bond in the sum of Five Hundred Dollars (\$500.00), to the effect that if the said petitioner and plaintiff in error shall prosecute the said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the said obligation to be void, otherwise to remain in full force and effect; and that the said J. C. Hadacheck may be enlarged upon a recognizance in the sum of Five Hundred Dollars (\$500.00), to the effect that if the said J. C. Hadacheck, petitioner and plaintiff in error, shall not upon the hearing of the said writ of error be ordered to be discharged from custody and restored to his liberty, he will surrender himself forthwith to the custody of C. E. Sebastian, Chief of Police of the City of Los Angeles, or pay the fine that may be imposed against him upon the hearing of the complaint and charge referred to in the petition for a writ of habeas corpus herein; the said bond and recognizance to be approved by this court.

Dated this 26 day of September, 1913.

W. H. BEATTY,
*Chief Justice of the Supreme Court
of the State of California.*

125 [Endorsed:] Crim. No. 1760. In the Supreme Court of the State of California. Clerk's Office Copy. In the Matter of the Application of J. C. Hadacheck, for a Writ of Habeas Corpus. Order Fixing Bond on Application for a Writ of Error. Filed Sep. 26, 1913, Grant Taylor, Clerk. By A. S. Ramage, Deputy. G. C. Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney- for petitioner.

126 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
vs.

C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Recognizance upon Writ of Error.

Know all men by these presents: That we, J. C. Hadacheck, as principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, with authority under the laws of the State of California to execute bonds, are held and firmly bound unto C. E. Sebastian, Chief of Police of the City of Los Angeles, and to his successor in office, respondent herein, in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said C. E. Sebastian, respondent and defendant in error, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of September, 1913.

Whereas lately, at a session of the Supreme Court of the 127 State of California, in an action pending in the said court, wherein the said J. C. Hadacheck was petitioner for a writ of habeas corpus, a final judgment was rendered therein discharging the said writ and remanding the said J. C. Hadacheck to the custody of the said C. E. Sebastian, Chief of Police of the City of Los Angeles; and the said J. C. Hadacheck having obtained from the said court a writ of error to reverse the judgment in the aforesaid matter, and upon the hearing thereof it has been ordered that the said J. C. Hadacheck be enlarged upon a recognizance:

Now, the condition of the above obligation is such that if the said J. C. Hadacheck shall appear and answer the judgment of imprisonment that may be imposed upon him by the Police Court of the City of Los Angeles pursuant to the complaint filed therein, as set forth in the petition for a writ of habeas corpus herein, and will at all times hold himself amenable to the orders and process of this court, and if the said judgment of this court discharging said writ shall be affirmed, will appear and subject himself thereto, or if he fails to perform either of the said conditions, we will pay to the people of the State of California the sum of Five Hundred Dollars (\$500.00), then the above obligation to be void, otherwise to remain in full force and effect.

J. C. HADACHECK. [SEAL.]
 [CORPORATE SEAL.] NATIONAL SURETY COMPANY,
 By CATESBY C. THOM,
Attorney in Fact.

127½ STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 26th day of September in the year one thousand nine hundred and thirteen, before me William M. Curran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as Attorney in Fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[NOTARIAL SEAL.] WILLIAM M. CURRAN,
Notary Public in and for Los Angeles County,
State of California.

The foregoing and within bond is hereby approved this — day of September, 1913.

W. H. BEATTY,
Chief Justice of the Supreme Court of the
State of California.

128 [Endorsed:] Crim. No. 1760. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck for a Writ of Habeas Corpus. Recognizance upon Writ of Error. Filed Sept. 26, 1913. B. Grant Taylor, Clerk, by A. S. Ramage, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney for petitioner.

129 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
 vs.

C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Bond on Application for a Writ of Error.

Know all men by these presents: That we, J. C. Hadacheck, as principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, with authority under the laws of the State of California to execute bonds, are held and firmly bound unto C. E. Sebastian,

Chief of Police of the City of Los Angeles, and to his successor in office, respondent herein, in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said C. E. Sebastian, respondent and defendant in error, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of September, 1913.

Whereas lately, at a session of the Supreme Court of the State of California, in an action pending in the said court, wherein the said J. C. Hadacheck was petitioner for a writ of habeas corpus a final judgment was rendered therein, discharging the said writ and remanding the said J. C. Hadacheck to the custody of the said C. E. Sebastian, Chief of Police of the City of Los Angeles; and the said J. C. Hadacheck having obtained from the said court a writ of error to reverse the judgment in the aforesaid matter; and a citation directed to the said defendant in error, the said C. E. Sebastian, Chief of Police of the City of Los Angeles, is about to be issued, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia:

Now, the condition of the above obligation is such that, if the said J. C. Hadacheck shall prosecute his writ of error to effect and shall answer all charges and costs that may be awarded against him if he fails to make good his plea, then the above obligation to be void, otherwise to remain in full force and effect.

J. C. HADACHECK. [SEAL.]
 [CORPORATE SEAL.] NATIONAL SURETY COMPANY,
 By CATESBY C. THOM,
 Attorney in Fact.

130½ STATE OF CALIFORNIA,
County of Los Angeles:

On this 26th day of September in the year one thousand nine hundred and thirteen, before me William M. Curran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as Attorney in Fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[NOTARIAL SEAL.] WILLIAM M. CURRAN,
Notary Public in and for Los Angeles County,
State of California.

The foregoing and within bond is hereby approved this — day of September, 1913.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the
State of California.*

131 [Endorsed:] Crim. No. 1760. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck, for a Writ of Habeas Corpus. Bond on Application for a Writ of Error. Filed Sept. 26, 1913. B. Grant Taylor, Clerk, by A. S. Ramage, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney for petitioner.

132 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

J. C. HADACHECK, Plaintiff in Error,
vs.
C. E. SEBASTIAN, Chief of Police of the City of Los Angeles, State of California, Defendant in Error.

In the Matter of the Application of J. C. HADACHECK for a Writ of Habeas Corpus.

Certificate of Final Judgment.

It is hereby certified that this cause was ordered to be and was determined in bank in the Supreme Court of the State of California, and that the said court in bank did, on the 15th day of May, 1913, decide the said cause and render judgment discharging the writ of habeas corpus herein and ordering the petitioner remanded to the custody of C. E. Sebastian, Chief of Police of the City of Los Angeles, the respondent and defendant in error herein; that the said judgment became final on the 14th day of June, 1913.

Wherefore, this certificate is ordered to be made a part of the record in the said cause and to be attested with the seal of the said court.

Dated this 19th day of September, 1913.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the
State of California.*

Attest:

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
*Clerk of the Supreme Court of the
State of California,*

By I. ERB, *Deputy Clerk.*

133 [Endorsed:] Original. Crim. No. 1760. In the Supreme Court of the State of California. In the Matter of the Application of J. C. Hadacheck, for a Writ of Habeas Corpus. Certificate of Final Judgment. Filed Nov. 20, 1913. B. Grant Taylor, Clerk, by —— Erb, Deputy. G. C. De Garmo, Emmet H. Wilson, 1146 Title Insurance Building, Los Angeles, Cal., Attorney- for petitioner.

134 I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed are true and correct copies of Petition for Writ of Habeas Corpus with Order attached; Return to Writ of Habeas Corpus, other than Exhibits attached thereto; Affidavit of J. C. Hadacheck; Opinion of the Supreme Court of the State of California; Petition for Writ of Error; Order allowing Writ of Error; Assignment of Errors; Original Writ of Error; Original Citation; Order Fixing Bond; Recognizance upon Writ of Error; Bond; and Certificate of Final Judgment, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 28th day of November, A. D. 1913.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk,*
By I. ERB, *Deputy Clerk.*

Endorsed on cover: File No. 23,954. California Supreme Court. Term No. 304. J. C. Hadacheck, plaintiff in error, vs. C. E. Sebastian, chief of police of the city of Los Angeles. Filed December 5th, 1913. File No. 23,954.



FILED

OCT 6 19

JAMES D. MA

19

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1915.
No. 32.

J. C. Hadacheck,

Plaintiff in Error,

vs.

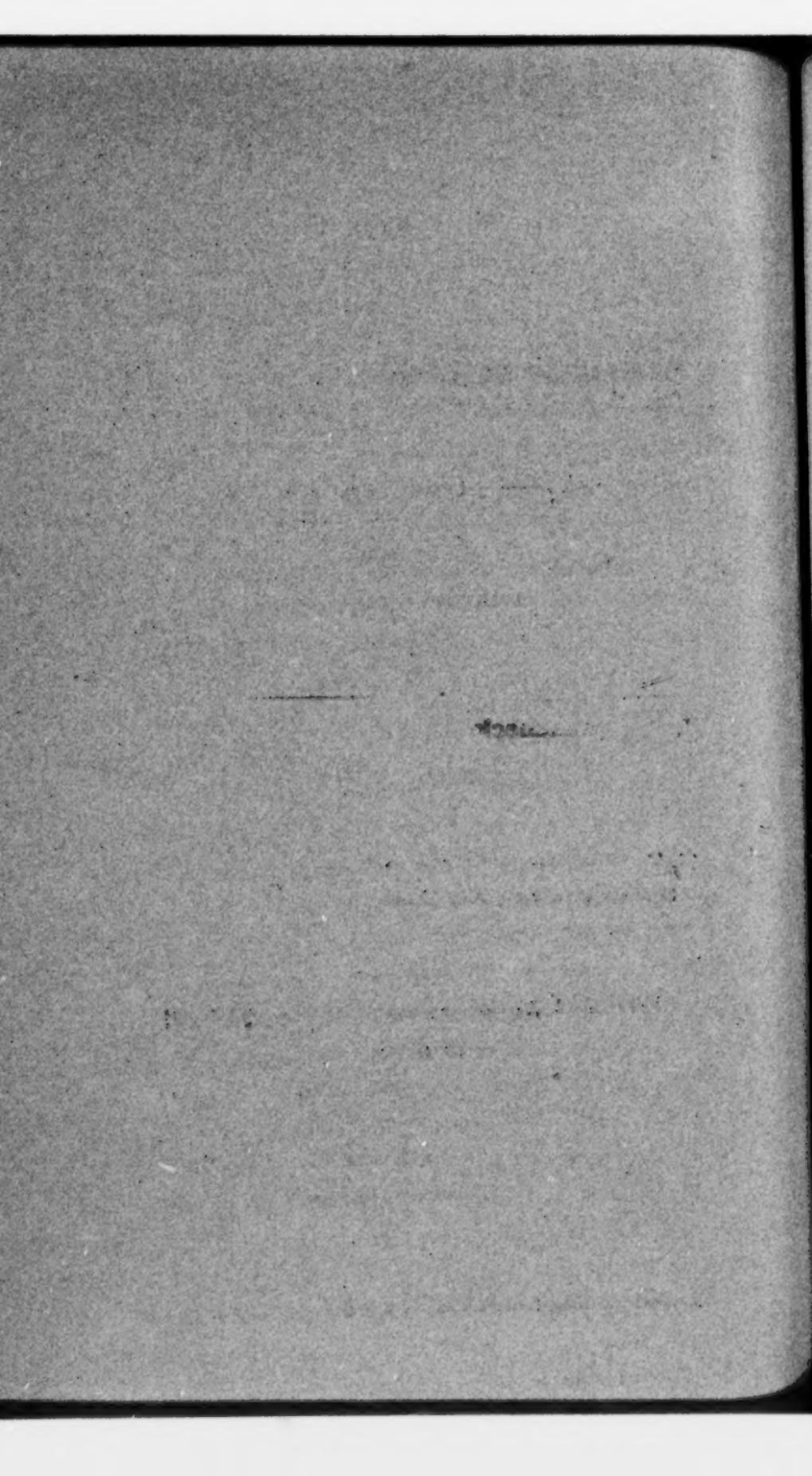
**C. E. Sebastian, Chief of Police of
the City of Los Angeles.**

Brief and Argument on Behalf of Plaintiff
in Error.

EMMET H. WILSON,
Attorney for Plaintiff in Error.

G. C. De GARMO,
Of Counsel.

Parker & Stone Co., Law Printers, 228 New High St., Los Angeles, Cal.
(23,954)



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SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 32.

J. C. Hadacheck,

Plaintiff in Error,

vs.

**C. E. Sebastian, Chief of Police of
the City of Los Angeles.**

Brief and Argument on Behalf of Plaintiff in Error.

This is a case in error to the Supreme Court of the state of California to review a judgment of that court denying the petition of the plaintiff in error to be released on a writ of habeas corpus from the custody of the defendant in error, C. E. Sebastian, chief of police of the City of Los Angeles, who detained the plaintiff in error by virtue of a warrant of arrest issued

out of the police court of the said city of Los Angeles, by which warrant the plaintiff in error was charged with having violated the provisions of an ordinance of the said city. The ordinance is hereinafter set forth.

STATEMENT OF THE CASE.

The plaintiff in error was arrested by virtue of a warrant issued out of the police court of the city of Los Angeles upon a complaint filed in the said court charging that the plaintiff in error had committed a misdemeanor in that he had conducted, operated and maintained a brick-yard, brickkiln and an establishment and place for the manufacture and burning of brick within a certain district or portion of the city of Los Angeles wherein the operation of such an establishment was prohibited by an ordinance of the city.

In March, 1902, the plaintiff in error purchased a tract containing about eight acres of land, which at that time was situated outside of the corporate limits of the city of Los Angeles and distant from any dwellings or any other habitations. The plaintiff in error purchased the property for the reason that there was situated thereon an extremely valuable bed of clay of a kind found only in a very few places in or about the said city of Los Angeles, and of a kind difficult to be found in any location wherein the

same could be utilized for the purpose of manufacturing brick. An additional reason for the purchase of the said property, as appears from the record, was that the same was outside of the city of Los Angeles and distant from any habitations, and the plaintiff in error believed that he would not be molested in his pursuance of the lawful and useful occupation of manufacturing brick thereon. The property is alleged to have been worth about eight hundred thousand dollars for brick-making purposes, and not to exceed sixty thousand dollars for any other purpose. The plaintiff in error expended about twenty-five thousand dollars for the construction of buildings on the said property and for the purchase and installation of brick-making machinery of the most modern type and design. No complaints were ever made regarding the operation of the brickyard in question until after the annexation of the surrounding territory to the city of Los Angeles, hereinafter mentioned.

The plaintiff in error at all times conducted his brickyard in a sanitary and lawful manner and in such a manner as not to cause annoyance to persons residing in the vicinity.

In October, 1909, at an annexation election held for that purpose, the territory in which the property of the plaintiff in error was situated was annexed to the city of Los Angeles. In February, 1910, proceedings were instituted for

the adoption of the ordinance complained of, and on the 22d day of March, 1910, the ordinance was adopted by the city council. The ordinance was presented to the mayor for his approval, but he vetoed the same, and in his message of disapproval stated that "where a business in itself lawful has been established, and a large amount of money invested therein, the owners thereof should be given a reasonable length of time within which they may close up their business or remove the same from the district within which it is proposed to prohibit the conducting of such business." The mayor suggested that a similar ordinance be adopted, not to go into immediate effect, but providing that after a date in the future to be fixed by the ordinance the operation of brickyards should be prohibited within the said district. Notwithstanding the veto of the mayor and the suggestions contained in his message, the ordinance was readopted by the city council.

The ordinance is as follows:

"ORDINANCE No. 19989.
"(New Series.)

"An ordinance prohibiting the maintenance of brickyards in a certain portion of the city of Los Angeles.

"The mayor and council of the city of Los Angeles do ordain as follows:

"Section 1. It shall be unlawful for any person, firm or corporation to establish, conduct,

operate or maintain, or to cause or permit to be established, conducted, operated or maintained, any brickyard or brick kiln, or any establishment, factory, or place for the manufacture or burning of brick, within that certain portion of the city of Los Angeles bounded and described as follows, to-wit:

“Beginning at the intersection of the westerly boundary line of the city of Los Angeles with the center line of Wilshire boulevard; thence easterly along the center line of Wilshire boulevard to the center line of Western avenue; thence southerly along the center line of Western avenue to the center line of Washington street; thence westerly along the center line of Washington street to the westerly boundary line of the city of Los Angeles; thence northerly following the various courses of the said boundary line to the place of beginning.

“Sec. 2. It shall be unlawful for any person, firm or corporation to conduct, operate or maintain, or to cause or permit to be conducted, operated or maintained, any brickyard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick, established prior to the passage of this ordinance, within that portion of the city of Los Angeles described in section 1 of this ordinance.

“Sec. 3. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than five (\$5) dollars nor more than two hundred (\$200) dollars, or by imprisonment in the city jail for a period of not more than one hundred (100) days, or by both such fine and imprisonment.

“Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation

of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance." [Tr. pp. 4 and 5.]

The area of the city of Los Angeles was at that time about 107.62 square miles, while the district within which the maintenance of brick-yards and brick kilns was prohibited by the said ordinance included *less than three square miles*, was sparsely settled, and the said district contained large tracts of unsubdivided and unoccupied land. [See map between pages 16 and 17, Transcript of Record.]

It further appears from the record that within the city of Los Angeles there were and had been for a long time prior to the adoption of the said ordinance a number of brick-manufacturing plants and brickyards in other portions of the city, the same being enumerated in the petition for a writ of *habeas corpus*. [Tr. pp. 9 and 10.] The other brickyards referred to are situated in a portion of the city that is thickly built up with residences and near the same are situated an orphans' home and a home for aged people, in each of which a large number of people reside. One of the large public parks of the city is situated a short distance from the said brickyards. The county hospital, maintained by the county of Los Angeles, in which are maintained several

hundred diseased and injured persons is very close to another brickyard.

It further appears from the record that in October, 1910, several months after the adoption of the ordinance complained of in this proceeding, a petition signed by several hundred persons residing in the vicinity of said brickyards was filed with the city council, and that in the said petition attention was called to the fact that the said brickyards were a menace to health, and that the same threw off large volumes of smoke, cinders and noxious gases, and were generally obnoxious to the people residing adjacent thereto.

This petition was considered by the city council, but no ordinance or other regulation was ever at **any time adopted** and no action taken, either for the purpose of suppressing or prohibiting the operation of the said brickyards or in any manner regulating their operation.

No ordinance or regulation of any kind whatsoever has ever at any time been adopted by the city of Los Angeles regulating the manufacture of brick or the manner of conducting or operating brick kilns or brickyards, and no attempt has ever been made by any of its officers to determine whether or not brickyards or brick

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kilns can be conducted or operated without creating or being a nuisance.

For a violation of the ordinance set forth in the record herein the plaintiff in error was arrested and was in the custody of the defendant in error as chief of police when the petition for a writ of *habeas corpus* was filed. After the hearing in the Supreme Court of the state of California the writ was discharged and the plaintiff in error was remanded to the custody of the chief of police. The opinion of the Supreme Court appears on pages 37 *et seq.* of the transcript of the record. It is to review the decision above mentioned that the matter is brought here upon a writ of error.

SPECIFICATION OF ERRORS.

I.

The Supreme Court of California erred in deciding that the said ordinance was a valid ordinance and that the same was not in violation of the provisions of the fourteenth amendment to the constitution of the United States as denying the plaintiff in error the equal protection of the law, and as an unwarranted and unlawful discrimination against the plaintiff in error, in that

the said plaintiff in error by the said ordinance is prohibited from maintaining or operating his business, while others who are his competitors, and whose places of business are situated in all respects similarly to that of the plaintiff in error, are not affected by the said ordinance, but are permitted to operate without hindrance or molestation.

II.

The said court erred in deciding that the said ordinance was a valid ordinance and that the same was not in violation of the provisions of the fourteenth amendment to the constitution of the United States as denying the plaintiff in error the equal protection of the law, and as an unwarranted and unlawful discrimination against the plaintiff in error, in that the plaintiff in error by the said ordinance is prohibited from maintaining or operating his business, while the maintenance and operation of no other business or occupation of any kind or character is prohibited by the said ordinance within the district described in the said ordinance, or in any other place.

III.

The said court erred in deciding that the said ordinance was a valid ordinance and that the

same was not in violation of the provisions of the fourteenth amendment to the constitution of the United States as denying the plaintiff in error the equal protection of the law, and as an unwarranted and unlawful discrimination against the plaintiff in error, in that the maintenance of brickyards, brickkilns and establishments for the burning of brick are prohibited within the said district, while no other business or occupation of any kind whatsoever, whether a nuisance or not, and no matter how conducted, is prohibited by the said ordinance within the district described therein, or at any other place.

IV.

The said court erred in not deciding that the matters charged in the complaint filed against the plaintiff in error did not constitute a public offense under any ordinance of the city of Los Angeles, or under law of the state of California, or under any statute of the United States, or by common law.

V.

The said court erred in not discharging the said plaintiff in error from the custody of the

defendant in error upon the return of the writ of *habeas corpus* herein.

VI.

The said court erred in deciding that the ordinance set forth in the record herein was a valid ordinance and that it was not in violation of the provisions of the fourteenth amendment to the constitution of the United States, in that by the said ordinance the plaintiff in error is deprived of his property without due process of law.

VII.

The said court erred in deciding that the said ordinance was a valid ordinance and that the same was not in violation of the provisions of the fourteenth amendment to the constitution of the United States, in that it deprives the plaintiff in error of his property without compensation.

VIII.

The said court erred in deciding that the said ordinance was a valid ordinance and that the same was not in violation of the provisions of the fourteenth amendment to the constitution of the United States, in that it abridges the privileges and immunities of the plaintiff in error, who is a citizen of the United States.

IX.

The said court erred in deciding that the said ordinance was a valid ordinance and that the same was not in violation of the provisions of the fourteenth amendment to the constitution of the United States in that the same amounted to and was a confiscation of the property of the plaintiff in error.

BRIEF.

If the ordinance is purported to have been enacted to protect the public health, morals or safety but has no substantial relation to those objects, constitutional rights have been invaded and it is the duty of the court so to adjudge.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220;

Lochner v. State of N. Y., 198 U. S. 45, 49 L. Ed. 937;

Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385.

The state, or any political subdivision thereof, when legislating for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the con-

stitution of the United States, and is not permitted to violate rights secured or guaranteed thereby.

Henderson v. Wickham, 92 U. S. 259, 23 L. Ed. 543;
Hannibal etc. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527;
New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516;
Walling v. Michigan, 116 U. S. 446, 29 L. Ed. 691;
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220.

The business of operating brickyard and manufacturing brick is a useful, necessary and lawful occupation and is not a nuisance *per se*.

Huckenstine's Appeal, 70 Pa. St. 102;
State v. Board of Health, 16 Mo. App. 8;
Phillips v. Lawrence V. B. & T. Co., 72 Kans. 643, 2 L. R. A. (N. S.) 92;
Denver v. Rogers, 46 Colo. 479;
Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 62 Am. St. Rep. 532, 37 L. R. A. 381;
Belmont v. New England Brick Co., 190 Mass. 442.

Therefore the city cannot prohibit the maintenance of a brickyard unless, *by reason of the*

manner of its operation, it becomes a nuisance in fact.

Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984;

Everett v. Council Bluffs, 46 Iowa 66;
Ex parte Sing Lee, 96 Cal. 354, 24 L. A. 195, 31 Am. St. Rep. 218;

In re Sam Kee, 31 Fed. 680;

In re Hong Wah, 82 Fed. 623;

Ex parte Whitwell, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152;

Stockton Laundry Case, 26 Fed. 611;

Denver v. Rogers, 46 Colo. 479, 104 Pac. 1042;

Denver v. Mullin, 7 Colo. 345, 353, 3 Pac. 697;

Phillips v. Denver, 19 Colo. 179, 184, 41 Am. St. Rep. 230.

The city council of the city of Los Angeles is not empowered to pass an ordinance making that a nuisance which is not a nuisance *per se*. The legislative declaration cannot alter the character of a business so as to make a nuisance of that which is not such in fact.

Ex parte Sing Lee, 96 Cal. 354, 24 L. A. 195, 31 Am. St. Rep. 218;

Los Angeles County v. Hollywood Cemetery Ass'n, 124 Cal. 344, 71 Am. St. Rep. 75;

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Grossman v. Oakland, 30 Ore. 478, 36
L. R. A. 593, 60 Am. St. Rep. 832;
In re Sam Kee, 31 Fed. 680;
In re Hong Wah, 82 Fed. 623;
Ex parte Whitwell, 98 Cal. 73, 19 L. R.
A. 727, 35 Am. St. Rep. 152;
Yates v. Milwaukee, 10 Wall. 497, 19 L.
Ed. 984;
Everett v. Council Bluffs, 46 Ia. 66;
Stockton Laundry Case, 26 Fed. 611.

The power possessed by the city *to abate* nuisances does not include power *to prevent* unless the business is a nuisance *per se*. Such things as become nuisances only because of the method of their operation cannot be stopped or suppressed, under the power to abate, except upon clear demonstration that they are nuisances.

Lake View v. Letz, 44 Ill. 81.

The mere legislative declaration of the existence of a nuisance will not be accepted as a fact by the courts.

Dobbins v. Los Angeles, 195 U. S. 223,
49 L. Ed. 169;
In re Hong Wah, 82 Fed. 623;
Stockton Laundry Case, 26 Fed. 611;
In re Smith, 143 Cal. 371;
Ex parte Sing Lee, 96 Cal. 354, 357;

Hume v. Laurel Hill Cemetery, 142 Fed. 552, 563;
Los Angeles County v. Hollywood Cemetery Assn., 124 Cal. 350;
Laurel Hill Cemetery v. City and County, 152 Cal. 464, 472;
Freund, Police Power, §63;
Dillon, Mun. Corp. (5th ed.), §666.

The determination by the legislative body of what is a proper exercise of the police power is neither final nor conclusive, but is subject to the supervision of the courts. Legislative judgment as to the reasonableness of an ordinance is not necessarily accepted by the courts.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169;
In re Kelso, 147 Cal. 611;
Covington & L. P. R. Co. v. Sandford, 164 U. S. 578, 592, 41 L. Ed. 560, 565;
Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385;
In re Smith, 143 Cal. 368;
Ex parte Whitwell, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152;
Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218;
In re Smith, 143 Cal. 368;
Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984;

Laurel Hill Cemetery v. City and County,
152 Cal. 464, 470;
Ruhstrat v. People, 185 Ill. 133, 49 L. R.
A. 181, 76 Am. St. Rep. 30;
Freund, Police Power, § 144.

In cases of this kind the court must scrutinize the objects and purposes sought to be accomplished by the ordinance in question for the purpose of determining its validity. In so doing they are not limited to matters that appear upon the face of the ordinance, but may consider all the circumstances in the light of existing conditions.

Dobbins v. Los Angeles, 195 U. S. 223,
49 L. Ed. 169;
Lake View v. Tate, 130 Ill. 247, 6 L. R.
A. 268;
Ex parte Patterson, 42 Tex. Crim. Rep.
256, 51 L. R. A. 654;
People v. Armstrong, 73 Mich. 288, 16
Am. St. Rep. 578;
Town of Oxanna v. Allen, 90 Ala. 468;
Tugman v. Chicago, 78 Ill. 405;
Cleveland etc. Co. v. Connorsville, 147
Ind. 277, 37 L. R. A. 175, 62 Am. St.
Rep. 418;
State v. Boardman, 93 Me. 73, 46 L. R.
A. 750;

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Kosciusko v. Slomberg, 68 Miss. 469; 12 L. R. A. 528, 24 Am. St. Rep. 281;
Town of Crowley v. West, 52 La. Ann. 526, 47 L. R. A. 652, 78 Am. St. Rep. 355;
Hume v. Laurel Hill Cemetery, 142 Fed. 552;
Laurel Hill Cemetery v. City and County, 152 Cal. 464, 472;
Odd Fellows' Cemetery v. San Francisco, 140 Cal. 226;
In re Smith, 143 Cal. 370;
In re Kelso, 147 Cal. 612;
Los Angeles County v. Hollywood Cemetery Assn., 124 Cal. 350;
Freund, Police Power, §68, 138;
Pieri v. The Mayor, 42 Miss. 493;
Corregan v. Gage, 68 Mo. 541;
Chicago v. Rumpf, 45 Ill. 90

"The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or the suppression of a lawful business."

Laurel Hill Cemetery v. City and County, 152 Cal. 464, 470, 472;
Hume v. Laurel Hill Cemetery Assn., 142 Fed. 552;
In re Kelso, 147 Cal. 611;
In re Smith, 143 Cal. 372;

Odd Fellows' Cemetery Assn. v. San Francisco, 140 Cal. 226, 236;
Los Angeles County v. Hollywood Cemetery Assn., 124 Cal. 350.

Discriminatory legislation cannot be sustained even though enacted under color of sanitary power.

Laurel Hill Cemetery v. City and County, 152 Cal. 464;
Freund, Police Power, §138.

A law is not general or constitutional if it imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a person selected from the general body of those who stand in precisely the same relation to the subject of the law.

Pasadena v. Stimson, 91 Cal. 238;
Bruch v. Colombet, 104 Cal. 347;
Darcy v. Mayor, 104 Cal. 642;
People v. C. P. R. R. Co., 105 Cal. 576, 584;
Cullen v. Glendora Water Co., 113 Cal. 503;
Ex parte Clancy, 90 Cal. 553;
Krause v. Durbrow, 127 Cal. 681.

The imposition of dissimilar regulations upon different persons engaged in the same business

must be founded upon differences that will rationally justify the diversity of legislation.

- Ex parte Jentzsch*, 112 Cal. 474;
Darcy v. Mayor, 104 Cal. 642;
· *Ex parte Bowen*, 115 Cal. 372;
Ex parte Dickey, 144 Cal. 237;
People *ex rel.* Wineburgh Adv. Co. v.
Murphy, 195 N. Y. 126;
Phillips v. City of Denver, 19 Colo. 179;
Belmont v. New England Brick Co., 190
Mass. 442;
Commonwealth v. Mahalsky, 203 Mass.
241;
Chicago v. Netcher, 183 Ill. 104, 75 Am.
St. Rep. 93;
Braceville Coal Co. v. People, 147 Ill. 66,
37 Am. St. Rep. 206, 22 L. R. A. 340.

The ordinance in question deprives the plaintiff in error of his property without due process of law and is therefore void.

- Frorer v. People*, 141 Ill. 171, 16 L. R.
A. 492;
Ramsey v. People, 142 Ill. 380, 17 L. R.
A. 853;
C. B. & Q. R. Co. v. Chicago, 166 U. S.
224, 41 L. Ed. 979;
Chicago v. Netcher, 183 Ill. 104, 48 L. R.
A. 261, 75 Am. St. Rep. 93;
Braceville Coal Co. v. People, 147 Ill. 66,
22 L. R. A. 340, 37 Am. St. Rep. 206.

In order to sustain the validity of a municipal ordinance it is necessary for the court to determine that its provisions are reasonable.

Chicago v. Rumpf, 45 Ill. 90;
Toledo W. & W. Ry. Co. v. Jacksonville,
67 Ill. 37;
Tugman v. Chicago, 78 Ill. 405;
Lake View v. Tate, 130 Ill. 247;
Town of Oxanna v. Allen, 90 Ala. 468.

The ordinance is unreasonable because the severe measures adopted were not reasonably necessary for the prevention of the acts complained of in reference to the brickyard. Remedies other than confiscation of the property would have been effective.

Dobbins v. City of Los Angeles, 195 U. S. 223, 49 L. Ed. 169;
Laurel Hill Cemetery v. City and County, 152 Cal. 464, 472;
Hume v. Laurel Hill Cemetery, 142 Fed. 552;
Los Angeles County v. Hollywood Cemetery Assn., 124 Cal. 349;
Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 26 L. R. A. (N. S.) 183;
Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218.

The ordinance is unreasonable because if any nuisance has existed the same may be abated by

regulatory rather than by suppressive and confiscatory measures. The business should be allowed to continue upon eliminating such features, if any, as constituted a nuisance.

Hume v. Laurel Hill Cemetery, 142 Fed. 552, 564; ,

Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 26 L. R. A. (N. S.) 183;

Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378;

Chamberlain v. Douglas, 48 N. Y. Supp. 710;

Pach v. Geoffrey, 22 N. Y. Supp. 275;

Yocum v. Hotel St. George Co., 18 Abb. N. C. (N. Y.) 340;

Miller v. Webster City, 94 Iowa 162.

The ordinance is unreasonable because it is not limited with reference to conditions and measures. The danger may be slight and remote while the remedy—entire suppression—could not be more drastic.

In re Smith, 143 Cal. 271;

Hume v. Laurel Hill Cemetery, 142 Fed. 552, 564;

Laurel Hill Cemetery v. City and County, 152 Cal. 472;

Freund, Police Power, §143.

The ordinance is unreasonable because the means adopted is out of proportion to the dan-

ger involved. The restraint should not be disproportionate to the danger.

County of Los Angeles v. Hollywood Cemetery Assn., 124 Cal. 350;
Odd Fellows' Cemetery Assn. v. San Francisco, 140 Cal. 226, 233;
Hume v. Laurel Hill Cemetery, 142 Fed. 552, 564;
Freund, Police Power, §§150, 158.

The ordinance is unreasonable because the law will not take cognizance of petty inconveniences and slight grievances.

Freund, Police Power, §178;
Joyce on Nuisances, §§93, 96;
Laurel Hill Cemetery v. City and County, 152 Cal. 464, 470;
Van de Veer v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396;
Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 63 Am. St. Rep. 533;
Tuttle v. Church, 53 Fed. 422;
Gilbert v. Showerman, 23 Mich. 448;
McGuire v. Bloomingdale, 29 N. Y. Supp. 580;
Miller v. Webster City, 94 Iowa 162;
Gallagher v. Flury, 99 Md. 181.

The ordinance is discriminatory and unreasonable because the district was unreasonably and irrationally created.

In re Sam Kee, 31 Fed. 680;
Stockton Laundry Case, 26 Fed. 611;
In re Hong Wah, 82 Fed. 623;
In re Smith, 143 Cal. 372;
Freund, Police Power, §179.

The police power cannot be used for the purpose of protecting property values.

Hume v. Laurel Hill Cemetery, 142 Fed. 552, 565;
In re Hong Wah, 82 Fed. 623, 625;
Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169;
Chicago v. Gunning System, 214 Ill. 628, 70 L. R. A. 230;
Ex parte Whitwell, 98 Cal. 73;
Ex parte Dickey, 144 Cal. 234, 236;
In re Smith, 143 Cal. 368;
In re Kelso, 147 Cal. 609;
Constitution of California, art. 11, sec. 11;
Cooley, Const. Lim. (7th ed.), 837.

The provision of the city charter (sec. 2, sub. 22), giving the city *general* power to make and enforce peace and sanitary regulations is modified and limited by the *specific* power given (sec.

2, sub. 13) to "restrain, suppress and prohibit" certain named occupations.

Rodgers v. United States, 185 U. S. 83,
46 L. Ed. 816;

In re Rouse, Hazard & Co., 91 Fed. 96;
Crane v. Reeder, 22 Mich. 322;

Phillips v. Christian County, 87 Ill. App.
481;

Felt v. Felt, 19 Wis. 193;

Nance v. Southern Ry. Co., 149 N. C.
366, 63 S. E. 116;

Hoey v. Gilroy, 129 N. Y. 132;

Stockett v. Bird's Admr., 18 Md. 484;

Nichols v. State, 127 Ind. 406;

State v. Hobe, 106 Wis. 411;

State v. Dinnesse, 109 Mo. 434;

Frandsen v. County of San Diego, 101
Cal. 317.

The city having adopted the special and limited power set forth in the charter (sec. 2, sub. 13), did not accept in its entirety the right to enforce the police power of the state as granted by section 11, article XI of the constitution.

John Rapp & Son v. Kiel, 159 Cal. 702,
709;

In re Pfahler, 150 Cal. 71, 81, 11 L. R.
A. (N. S.) 1092;

People v. Newman, 96 Cal. 605;

State v. Ferguson, 33 N. H. 424;

Northwestern Tel. Exch. Co. v. St. Charles, 154 Fed. 386;

City of St. Louis v. Western Union Tel. Co., 149 U. S. 465, 37 L. Ed. 810.

The legislative body of a city having free-holders' charter may be limited by *charter provision* in the exercise of the police power conferred upon the city by the constitution of the state.

John Rapp & Son v. Kiel, 159 Cal. 702, 709;

In re Pfahler, 150 Cal. 71, 81, 11 L. R. A. (N. S.) 1092;

People v. Newman, 96 Cal. 605;

State v. Ferguson, 33 N. H. 424.

ARGUMENT.

At the outset we direct the attention of the court to the character of the business carried on by the plaintiff in error. He is engaged in the manufacture of brick. The plaintiff in error purchased the property occupied by him because of the valuable bed of clay situated thereon, which clay is of a particularly fine quality and of a kind found only in a very few places in or about the city of Los Angeles. [Tr. p. 3.]

A laundry, an artificial gas plant, a fertilizer factory and practically all businesses that are

nuisances *per se*, or that may become nuisances by reason of the manner in which they are conducted, may be carried on at any location; if they are prohibited in one section of the city, they may at slight expense be transported to and conducted in another location. A brick-manufacturing plant, however, like a stone quarry, an oil well and a mine, must be carried on at the source of supply.

Barnard v. Sherley, 135 Ind. 547;
Phillips v. Lawrence V. B. & T. Co., 72
Kans. 643, 2 L. R. A. (N. S.) 92.

From a financial standpoint it would be prohibitive to remove the clay from the ground, transport it to a distant location and there manufacture the same into bricks and then transport the bricks to places where they would be used in construction work. The cost of such an operation would be so great that the person attempting to do business in that manner could not by any possibility compete with other brick manufacturers.

In the respect above mentioned the business engaged in by the plaintiff in error is so different from those occupations that have been summarily ejected from certain favored locations in municipalities that this case should be considered separate and apart from former decisions of this court upholding restrictive ordinances.

Not only in order that the plaintiff in error may conduct his business at a profit, but in order that he may be enabled to develop the natural resources of his property and to utilize a very valuable bed of clay situated thereupon, it is necessary that he be permitted to manufacture brick upon the property whereon the clay is found.

The same question involved here was passed upon in the case of *In re Kelso*, 147 Cal. 609. In that case an ordinance of the city and county of San Francisco provided that "no person, company or association shall maintain or operate any rock or stone quarry within that portion of the city and county of San Francisco bounded as follows:" Then followed a description of a large portion of the city. The petitioner in that case was charged with maintaining and operating a stone and rock quarry within the district designated. In that case the Supreme Court of California said:

"The effect of the ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within certain designated limits of the city and county of San Francisco is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, —viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of. While the use to which a man may put his property may be

restricted or regulated by the state, in the exercise of its police power, so far as may be necessary to protect others from injury from such use, it is of course elementary that the enjoyment of one's property cannot be interfered with or limited arbitrarily. As is said in Tiedeman's Limitations of Police Power, the next thing to depriving a man of his property is to circumscribe him in its use. *A limitation of the use pro tanto deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law.* (Sects. 122, 122a.) While in the exercise of its police power the state may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. If it does not, it is an unwarrantable invasion of property rights, against which the courts will protect. Whether or not a certain limitation or regulation is essential is largely a question for the legislative department, to be determined with reference to all the existing circumstances, and the courts will not ordinarily interfere where it can be seen that the regulation has some proper relation to an object within the domain of the police power of the state, which, as stated by Mr. Cooley, includes all regulations having reference to 'the comfort, safety or welfare of society.' *But regulations which transcend these objects cannot be upheld by the courts as legitimate police regulations.* (See *Ex parte Dickey*, 144 Cal. 234, 236 [103 Am. St. Rep. 82, 77 Pac. 924].)

"Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it

may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others it is a lawful use which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power. * * *

"For instance, an ordinary method of loosening rock or stone is blasting with powder, dynamite, etc., and respondent urges this as one of the reasons why the operation of a quarry is dangerous to the public safety. This objection goes, however, only to the way in which the work is done, and not to the work itself. * * *

"We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be done, and this being so, we are satisfied that an absolute prohibition of such removal under all circumstances cannot be upheld." (Italics ours.)

The reasons advanced herein for the reversal of the judgment of the Supreme Court of California are as follows:

I.

The ordinance is void for the reason that it denies the plaintiff in error the equal protection of the law, and it unlawfully discriminates against the plaintiff in error in this:

(a) It prohibits him from manufacturing brick upon his property, while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of the plaintiff in error.

(b) It prohibits the plaintiff in error from conducting his business upon his own property, while it does not prohibit the maintenance, within the same district, of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted.

II.

The ordinance is void for the reason that it deprives the plaintiff in error of his property without due process of law; it takes his property without compensation; it confiscates his property; it abridges his privileges and immunities.

1. Under special provisions of the city charter the city may "regulate," but may not "suppress" or "prohibit" the maintenance of brickyards.
2. The general powers of the city under its charter, relative to the exercise of the police power, are not unlimited.
 - (a) The general provisions of the charter are limited by the charter itself in its special provisions.
 - (b) Both general and special powers of the city are subject to construction and limitation by the courts.
3. The ordinance is unreasonable.

I.

The Ordinance is Void for the Reason that it Denies the Plaintiff in Error the Equal Protection of the Law, and it Unlawfully Discriminates against him in this:

- (a) IT PROHIBITS HIM FROM MANUFACTURING BRICK UPON HIS PROPERTY, WHILE HIS COMPETITORS ARE PERMITTED, WITHOUT REGULATION OF ANY KIND, TO MANUFACTURE BRICK UPON PROPERTY SITUATED IN ALL RESPECTS SIMILARLY TO THAT OF THE PLAINTIFF IN ERROR.
- (b) IT PROHIBITS THE PLAINTIFF IN ERROR FROM CONDUCTING HIS BUSINESS UPON HIS OWN PROPERTY, WHILE IT DOES NOT PROHIBIT THE

MAINTENANCE, WITHIN THE SAME DISTRICT, OF ANY OTHER KIND OF BUSINESS, NO MATTER HOW OBJECTIONABLE THE SAME MAY BE, EITHER IN ITS NATURE OR IN THE MANNER IN WHICH IT IS CONDUCTED.

On pages 9, 10 and 11 of the transcript are enumerated a number of brick-making plants in the city of Los Angeles surrounded by residences, parks, hospitals, etc. The business of the plaintiff in error does not create any greater discomfort and is not any greater nuisance than the other brick-manufacturing plants mentioned in the petition. It is further shown that the city council even though petitioned to regulate or suppress the other brickyards, has steadfastly refused to take any notice of the petitions or to adopt any ordinance whatsoever either prohibiting the maintenance of the brickyards or in any manner regulating the conduct thereof. We maintain that the plaintiff in error has been grossly and unlawfully discriminated against to the advantage and benefit of those who are his direct competitors in business.

In the case of *Van Harlingen v. Doyle*, 134 Cal. 53, 59, it is said:

"It is one of the highest privileges of the citizen that he may engage in legitimate business upon equal terms—'the same terms'—granted to all citizens."

The plaintiff in error unquestionably has a constitutional right to engage in business upon the same terms as are granted to his competitors. The defendant in error claims that the business of the plaintiff in error is so different from that of his competitors that his business may be suppressed, notwithstanding the result is the confiscation of his property, while the same character of business, conducted under similar surroundings and in a similar way, may be permitted to continue. To quote from the case last cited:

“The only reason why it does not stand upon the same terms results from no natural, intrinsic or constitutional distinction, but from an arbitrary and unreasonable distinction created by the law (ordinance) itself.”

In the case of *Pasadena v. Stimson*, 91 Cal. 238, it is held that a law is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.

How easy it would be for the city council to draw a line around a certain small area of the city and to declare that certain industries should not be carried on within that area and thereby destroy a business, yet at the same time permit

a favored competitor's business to proceed undisturbed, even though situated and carried on in every respect identical with the prohibited business. Given the rule that the motives of a legislative body may not be inquired into, and given the power to create "residence" districts without the restriction that it is only those things that operate to the tangible and perceptible injury of the general public or that cause material physical discomfort to the public that may be regulated, either relatively or absolutely, and the combination is infinitely powerful for oppression.

In this connection we quote from the opinion in the case of *State v. Donaldson*, 41 Minn. 74:

"A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of public health it must be a health law, having some relation to public health. In this day when so many selfish and private schemes in the way of securing monopolies and excluding competition in trade are attempted under the guise of sanitary legislation, it may be an important question whether the judiciary are concluded by the mask or whether they may tear it aside in order to ascertain who is in it."

It is a weak answer to the possible discrimination, oppression and monopoly that may be produced from this extraordinary alleged authority to create residence districts, that the regulation

operates uniformly upon all within the district—particularly if the district has been so formed that the particular individual or industry intended to be affected is the only one within that district. In the case at bar is it an answer to the charge of discrimination that all brickyards within the district described in the ordinance are affected uniformly, where it appears that the brickyard of the plaintiff in error and that of one other person are the only brickyards within the exceedingly small district described, while a number of other brick manufacturers, competitors of the plaintiff in error, and doing business under like surroundings and in a like manner, though in a different location, are permitted, without molestation or regulation, to continue their business? Likewise, is it an answer to say that all brickyards within the district described are prohibited while any other business of any kind or character—no matter how objectionable the same may be or how the same may be conducted—is permitted to operate in the same district?

Was there any reason for specifying the particular district defined in the ordinance in question here other than the fact that the brickyard of the plaintiff in error was within that area? As alleged in the petition, there is no distinction between the area of the city within the district and the portion without the district. In fact,

it is set forth in the record that the district described in the ordinance is sparsely settled and that there are large bodies of unoccupied and unsubdivided land therein. A reference to the map in the record will show that the district is upon the extreme western boundary of the city. These facts ought to indicate to a fair mind that the boundaries of this district were determined, not by the interests of the public generally, but by the location of the property of the plaintiff in error, and that the district was formed for the single and express purpose of prohibiting and suppressing the plaintiff in error's business.

The facts set forth in the record bring the case at bar squarely within the rule laid down in *In re Smith*, 143 Cal. 368. Here, as there, lines have been drawn around a certain business and it has been ordained that that character of business shall not be conducted therein. The controlling factors in the case last cited were:

1. The selection out of a wide territory of a small district within which it was made unlawful to maintain the occupation.
2. The lack of any distinction between the district itself and other portions of the territory outside of the district that would warrant the particular selection that was made.

3. If the occupation was a positive public detriment within the district described in the ordinance, it would be as well, or more so, in other portions of the general territory.

4. The previous establishment within the district at considerable expense of the business sought to be prohibited.

From these factors the Supreme Court of the State of California concluded that even while conceding that it was "within the powers of the board of supervisors in *proper* cases to regulate or *even to prohibit* the manufacture of gas within prescribed limits," yet the design and effect of the ordinance in question was special and discriminatory and was manifestly intended to prohibit and suppress the particular business of the petitioner in the said proceeding, and that therefore the ordinance complained of was void.

In the case at bar the same four factors above enumerated are found. The conclusion in this case is as inevitable as it was in the *Smith case*, that the "interests of the public generally" throughout the city did not require this harsh and confiscatory measure, and that the ordinance was designed, not for the purpose of protecting the public health or the public safety, and not for the benefit of the general public, but that the manifest purpose of the ordinance was to suppress the particular business of the plaintiff in

error as well as the other small brickyard near by, referred to in the record.

The court is bound to take judicial notice of the fact that irrespective of the character of the district described in the ordinance there are many industries that are a much greater menace to the public peace, health and safety than that of brick-making, whether carried on in a residential district or elsewhere. The ordinance in question here does not prevent any one from establishing within the limits of the district described in the ordinance stone crushers, rolling mills, soap factories and other works similar or worse in their nature.

What is there in the object of the ordinance under consideration that furnishes a ground of distinction between brickyards and the many other businesses that generate smoke, soot, dust and noise?

In the return to the writ of *habeas corpus*, and in the affidavits attached thereto, reference is made to the emission of smoke, soot and gas while bricks are being burned in the brickyard of the plaintiff in error. It is self-evident that the primary and principal object of the ordinance, if not the sole purpose thereof, was to prohibit those objectionable features—not to prohibit the making of brick, though the latter appears from the face of the ordinance. The mere manufacturing and burning of brick cer-

tainly could not be subject to prohibition. We understand the rule to be as stated in the case of *Varney & Green v. Williams*, 155 Cal. 318, that mere esthetic taste or desire is not sufficient to warrant legislation of this kind. Therefore, unless in the operation of the plant there followed results that were objectionable to some extent we apprehend that no legislation would have been attempted. *The ordinance operates unequally in that for the purpose of preventing some objectionable features of this business this single occupation is entirely prohibited, while no other occupation causing the same objections is prohibited, or even regulated.* The case at bar comes within the rule stated in the case of *Atchison, T. & S. F. Ry. Co. v. Vosburg*, . . U. S. . . (decided June 1, 1915), in which this court held that a police regulation, like any other law, is subject to the "equal protection" clause of the Fourteenth Amendment, and in its opinion said:

"The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but *does require that classification be reasonable, not arbitrary*, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

It seems self-evident that the ordinance involved here must be held to be class legislation and discriminatory against the plaintiff in error, and for that reason void.

The case of *Ex parte Bohem*, 115 Cal. 372, is a case in point. In that case the question of the validity of an ordinance prohibiting the purchase of lots for burial purposes, and regulating the interment of dead bodies, in the city of San Francisco, was under consideration. In that case the court said:

"The fact that the 'unlimited' burial of the dead within the city is 'dangerous to life and detrimental to the public health,' may be a sufficient reason for the enactment of an ordinance fixing a term after which such burials shall cease within certain portions of the city, but, while burials are permitted within a district, the privilege cannot be limited to one class of citizens and denied to another class within the same district. The police power is to be exercised for the good of the entire public, and any restriction of the rights of the individual by virtue of this power must extend to all the individuals who might otherwise exercise the right. * * *

"The right to prohibit burials within a certain district rests upon the proposition that any burial within that district is injurious to the public health; but an ordinance permitting burials within that district to an extent greater in number than it prevents cannot be upheld as an exercise of the police power. An ordinance forbidding

the burial of human bodies within the city, or upon any designated portion thereof, cannot be sustained, if such burial be permitted upon other lots similarly situated, any more than can an ordinance forbidding the conducting of a soap-boiling factory, or any other occupation which may, under certain circumstances, be deleterious to health; and the owner of lands cannot be restrained from selling them for the purpose of being used as a place of burial, or conducting a soap-boiling factory, or any other use which in the future may become deleterious to health, and for that reason be forbidden, but which is not forbidden at the time of the sale."

In the face of the facts set forth in the record can it be said, in view of the language expressed by the court in the case last cited, that the manufacture of brick may be prohibited within one portion of the city and allowed to continue within another portion of the city under identical circumstances and surroundings?

In the case of *Mayor of Hudson v. Thorne*, 7 Paige 261, the city had adopted an ordinance forbidding the erection of any wooden or frame barn, stable or hay press within a certain portion of the city without a permit from the common council and a resolution by the city that such building was not dangerous in causing fires. The defendant, without such permission, commenced the erection of a building within the

prescribed limits, which was to be occupied for the storing and pressing of hay. The court said:

"If the manufacture of pressed hay within compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture," but as all by-laws must be reasonable the common council cannot make a by-law which shall permit one person to carry on a dangerous business and prohibit another who has an equal right from pursuing the same business."

In the case of *Tugman v. Chicago*, 78 Ill. 405, the city of Chicago had passed an ordinance prohibiting the erection or operation after a certain date of slaughter houses in a certain designated portion of the city "in any building not now used for such purpose." The court held that the ordinance was invalid for the reason that it discriminated between those owning and operating slaughter houses prior to the date specified and those erecting and operating them after that date, upon the ground that an ordinance which would make an act done by one penal, and impose no penalty for the same act done under like circumstances by another, should not be sanctioned or sustained, because it was unjust and unreasonable.

In the *Tugman* case the court said:

"The fact that certain persons were engaged in the business within the district

designated in the ordinance, at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege, who should engage in the business at a later period.

"If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced.

"A regulation of this character, to be binding upon the citizen, must not only be general, but should be uniform in its operation."

In the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679, 689, this court said:

"The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

The Supreme Court of California, after having upheld some very drastic ordinances, seems to have realized that there is a limit beyond which a municipality cannot go in restricting

lawful enterprises. In *Ex parte Throop*, 145 Pac. 1029 (decided January 3, 1915, and not yet reported in the official reports), the court had under consideration an ordinance of the city of South Pasadena, prohibiting the operation of a stone crusher in a certain district of the said city. The ordinance was held void. In the course of the opinion the court said:

"Concrete has become a very important factor in the construction of improvements in our cities and towns, and in the construction of roads and highways. Rock, sand and gravel and cement are necessary ingredients in concrete construction and must be obtained. The business of producing these materials, if maintainable within the confines of a city or county *without becoming a public nuisance* or injurious to the health, comfort, safety or welfare of the inhabitants, *cannot by legislative bodies be arbitrarily suppressed or interfered with.*" (Italics ours.)

In the case of *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385, it is said:

"The legislature may not under the guise of protecting the public interests arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

In the case of *Dobbins v. City of Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, an ordinance of the city of Los Angeles making it unlawful to maintain gas works outside of certain district was held void. In the course of the opinion this court used the following language:

"It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

In the case of *Lake View v. Tate*, 130 Ill. 247, 6 L. R. A. 268, the municipality had passed an ordinance for the purpose of regulating the speed of railroad trains and dividing the city

into two districts therefor. It was provided that in one district no train should be run at a greater speed than ten miles per hour, while no restriction upon speed was made within the other district. It was shown that the route of one railroad was entirely within one district, and that of another railroad in the other district. The court held that the ordinance was unreasonable, and void for the reason that it constituted a special and unwarranted discrimination between two lawful and competing lines of railway; that as the line of each of the roads ran through a thickly settled portion of the city with no appreciable difference of danger to those crossing the tracks of the two railways, there was no justification for the discrimination.

In the case of *County of Los Angeles v. Hollywood Cemetery Association*, 124 Cal. 344, the court held that an ordinance of the county of Los Angeles making it unlawful to locate, establish, extend or enlarge any cemetery without the permission of the board of supervisors of the county was void. The court declined to assume that the ordinance was adopted with a view to reach the defendant's enterprise especially, but presumed that their purpose was to promote the welfare of the inhabitants, and determined the validity of the ordinance from its face alone. The court held, however, that

the ordinance was void, stating that the board of supervisors might *regulate* the manner of conducting a business if the same were of a character tending to be injurious, but if the business were lawful the supervisors, *under the guise of regulating a business, could not make prohibition possible* by permitting to the officers of the municipality the arbitrary power to deny permission to engage in that business.

In the return to the writ of *habeas corpus* the defendant in error made certain allegations as to the emission of smoke, soot and noises from the brick kiln of the plaintiff in error during the time that brick were being burned. It is apparent therefore that it was not because the plaintiff in error was engaged in the manufacture of brick that this ordinance was passed to prohibit the continuance of his business, but because in the operation of his plant and in the manufacture of brick certain results accompanied such operation, namely, the emission of smoke, soot and noise. Therefore, if this is the basis for the classification we maintain that all other industries to which similar objections could be made should be included. In other words, that the prohibition should not be limited to brick manufactories, but to other industries in the operation of which smoke, soot or noises are emitted. We have adverted to the fact that there was nothing to prevent the establishment

within the district in question of any number or any kind of industries, the result of the operation of which would be equally or more deleterious to the adjacent inhabitants than that produced by the plant of the plaintiff in error. Glue factories, soap factories, stone crushers, rolling mills and innumerable other offensive establishments might be maintained, whereas the operation of the brick yard is prohibited, even though the result is the entire confiscation of a valuable tract of land.

We are all well aware, and this court knows, of the constant struggle, particularly in cities, between business and residence sections. In the residence sections all property owners are constantly desiring to curtail or to suppress business in order that their enjoyment of their residences may not be in any manner impaired. We cannot call upon the courts to arbitrate the differences thus arising. It is the duty of the courts, however, to guard the boundaries laid down in the constitution and to see that valuable business is not destroyed under the guise of regulation, and to see that the guaranties contained in the constitution protecting rights of property are enforced. We look in vain in the constitution for any protection or rights given to residence property superior to that guaranteed to the business use of property.

It is not for the legislative body to say that

a particular piece of property may be used for one purpose and shall not be used for another. The city council has no right to say that the plaintiff in error shall not be permitted to use his property for the purpose of manufacturing brick, developing the natural resources of his property and obtaining a profit therefrom, while at any other place within the district described in the ordinance other persons may erect and maintain factories of any kind or character.

In the attempt that the city council has made to limit the use of property by the ordinance in question the guaranty of the constitution that property shall not be taken without due process of law has been violated. The action of the city council amounts to a condemnation of this property and to a confiscation thereof without any consideration whatsoever. The record shows that the property is extremely valuable and useful for brick-making purposes, that a deep excavation has been made covering a large portion of the property, and that if the same cannot be used for brick-making purposes it will be practically valueless for any other purpose.

In the case of *Cosgrove v. City of Augusta*, 103 Ga. 835, the court said:

"An ordinance which prescribes that certain persons shall not carry on their business, which would otherwise be legitimate, in a particular place, or on certain premises,

is, as to such place or premises, clearly prohibitive; and to authorize the passage of such an ordinance, where the power is undoubted, the injury to the public, which furnished the justification for the ordinance should proceed from the inherent character of the business when conducted at such a place or upon such premises. Where, however, the business can be conducted there by proper persons without harm or inconvenience to the public, the prosecution of it should not be entirely prohibited, but such necessary police rules and regulations should be prescribed for carrying on such business in that particular locality as may be necessary for the public good."

In *Ex parte Frank*, 52 Cal. 606, an ordinance of the city and county of San Francisco, known as the "Sample Sellers' Ordinance," the court said:

"It becomes material, therefore, to inquire what powers have been conferred upon the board of supervisors of San Francisco in respect to licensing occupations. By the third section of the Act of March 30th, 1872 (Statutes 1871-2, p. 736), it is provided that the board of supervisors shall haev power, by ordinance, 'to license and regulate all such callings, trades and employments as the public good may require to be licensed and regulated, and as are not prohibited by law.'

* * * * *

"An ordinance passed under a general authority of this nature must be, first, 'reasonable, consonant with the general powers and purposes of the corporation, and

not inconsistent with the laws or policy of the state'; second, it must not be oppressive; third, it must be impartial, fair and general; fourth, it may regulate but must not restrain trade. (Dillon Municipal Corporations, Secs. 253 to 257, inclusive, and authorities there cited.)

* * * * *

"Tested by these rules, the 'Sample-Sellers' Order' (ordinance), now under review, must be held to be inoperative and void. It is obnoxious to all the objections above enumerated. It is flagrantly unjust, oppressive, unequal and partial. It discriminates between merchants in the same place, dealing in the same kinds of merchandise, for no better reason than that one deals in goods either actually in the corporate limits, or *in transitu* under a bill of lading. If this kind of discrimination be legitimate and valid, there is no reason why a merchant having his goods in a warehouse on a particular street might not be required to pay a license fee of ten thousand dollars, while another merchant doing the same kind of business, in the same city, and with his goods stored in another street, would be required to pay only ten dollars."

The prohibition of brickyards, no matter how carefully conducted, how far removed from dwellings or public buildings, how enclosed or what fire protection maintained, while other manufactories are permitted in the same district without regulation of any kind, clearly shows that the rule of classification adopted does not correspond to any danger to be guarded against.

This discrimination alone renders the ordinance void.

The classification must be founded upon differences which rationally justify the diversity of legislation.

Ex parte Jentzsch, 112 Cal. 474;

Darcy v. Mayor of San Jose, 104 Cal. 642;

Ex parte Bowen, 115 Cal. 372;

Ex parte Dickey, 144 Cal. 237;

People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126;

Phillips v. City of Denver, 19 Colo. 179, 41 Am. St. Rep. 230;

Belmont v. New England Brick Co., 190 Mass. 442;

Commonwealth v. Mahalsky, 203 Mass. 241;

Chicago v. Netcher, 183 Ill. 104, 75 Am. St. Rep. 93;

Braceville Coal Co. v. People, 147 Ill. 66, 37 Am. St. Rep. 206.

In the case of *McCue v. Ramsey County*, 48 Minn. 236, the court had under consideration a statute passed by the legislature prohibiting the emission of dense smoke in the city of St. Paul, but provided that nothing in the act should be construed to apply to manufacturing establishments using the entire products of combustion within the building in which it was

generated, or within a radius of 300 feet therefrom. The court held the act invalid upon the ground that the classification attempted was untenable. It must be borne in mind in considering this opinion that the court was passing upon an act of the legislature, that the legislature possessed the whole police power of the state, and that there were no restrictions in the constitution against the passage of special legislation. In that case the court said:

"No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable."

In the case of *City of Shreveport v. Robinson*, 51 La. Ann. 1314, the court held void an ordinance prohibiting the establishment or operation of a laundry in any building except in a stone or a brick building. The court said:

"An ordinance which would not affect a blacksmith, a carpenter or other mechanic

using boilers or other machinery in the same locality has the effect (in all probability never intended) of discriminating against an occupation and business, especially if it does not appear that the business in any manner endangers public health, under proper regulation, and does not give rise to greater risks from fires. Now, as relates to regulating a laundry, no attempt is made in that direction, save that it must be operated, if at all, in a brick or stone building. We do not think it is customary or lawful to select a particular occupation or business in a locality and bring it within the range of a city ordinance establishing a 'fire limit.'

The prohibition in the ordinance in question in this action, against maintaining brickyards, is not based upon the nearness or remoteness of other buildings, but is equally prohibitory whether other buildings are near the brickyard or not. The prohibition equally exists no matter what precautions are taken by the owner of the brickyard, and no matter whether in the operation of the brickyard any smoke, soot or gas is emitted therefrom, or whether any noise is produced therein; and the prohibition equally exists even though the brickyard is entirely surrounded by equal or greater fire risks than the brickyard itself, and although the same is surrounded by factories of any and every kind producing smoke, gas, foul odors, loud noises and every other character of nuisance that may be gen-

erated in or emitted from a factory. As we have hereinbefore pointed out, the prohibition against the brickyard exists even though in the same district there are located fertilizer factories, glue factories, gas plants, slaughter houses and other institutions, which, from their very nature, can scarcely be operated without the creation of an intolerable nuisance.

In the case of *People ex rel. Wineburgh Advertising Company v. Murphy*, 195 N. Y. 126, an ordinance of the city of New York regulating the erection of sky signs was held to be invalid. The court in that case said:

"It is general in its terms, and it is as prohibitive in remote parts of the city as in the congested parts thereof, and to a structure erected at a safe distance from any street or public place as one erected upon the front wall or cornice of a building situated upon the building line of a public way. The prohibited height is also based upon an arbitrary measurement above the front wall or cornice of the building. * * * The prohibition is, therefore, not dependent upon the dangerous location of the structure, nor is it based upon the height or safety of the particular thing constructed. * * * The physical danger to the public does not arise from the advertisements. The advertisement, announcement or direction bears no relation to the safety of the structure itself. * * *

"The classification of the sky sign by the ordinance in question is dependent upon the letter, word, model, sign, device or repre-

sentation in the nature of an advertisement, announcement or direction, and it has no direct relation to the safety of the public. An ordinance which purports to legislate for public safety must tend in some appreciable way to that end. Unless there is substantial connection between the assumed purpose of the ordinance and the end to be accomplished, such ordinance is unenforceable."

We confidently submit that the ordinance in question in this case is discriminatory against the plaintiff in error and denies him the equal protection of the law, in violation of the constitution of the United States, in the two particulars mentioned, to-wit: It prohibits him from manufacturing brick upon his property, while other brickyards similarly situated and surrounded are neither regulated, restrained, suppressed nor prohibited. By the inclusion of the property of the plaintiff in error within the very small district described in the ordinance (about one thirty-sixth of the total area of the city) the plaintiff in error is prohibited from conducting a lawful, necessary and useful business upon his own property, and he is prevented from developing the natural resources of his property and from removing, using and manufacturing the valuable materials found thereon, while no other business, occupation or factory—whether the same be a nuisance or not—is prohibited from being maintained in the same district.

II.

The Ordinance is Void for the Reason that it Deprives the Plaintiff in Error of his Property Without Due Process of Law; it takes his Property Without Compensation; it Confiscates his Property; it Abridges his Privileges and Immunities.

I. UNDER SPECIAL PROVISIONS OF THE CITY CHARTER THE CITY MAY "REGULATE," BUT MAY NOT "SUPPRESS" OR "PROHIBIT" THE MAINTENANCE OF BRICKYARDS.

2. THE GENERAL POWERS OF THE CITY UNDER ITS CHARTER, RELATIVE TO THE EXERCISE OF THE POLICE POWER, ARE NOT UNLIMITED.

(a) THE GENERAL PROVISIONS OF THE CHARTER ARE LIMITED BY THE CHARTER ITSELF IN ITS SPECIAL PROVISIONS.

(b) BOTH GENERAL AND SPECIAL POWERS OF THE CITY ARE SUBJECT TO CONSTRUCTION AND LIMITATION BY THE COURTS.

3. THE ORDINANCE IS UNREASONABLE.

THE ORDINANCE IS VOID FOR THE REASON THAT IT DEPRIVES THE PLAINTIFF IN ERROR OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW; IT TAKES HIS PROPERTY WITHOUT COMPENSATION; IT CONFISCATES HIS PROPERTY; IT ABRIDGES HIS PRIVILEGES AND IMMUNITIES.

In the case at bar it is shown by the record [Tr. p. 11] that no ordinance of any kind whatsoever has ever been adopted by the city of Los Angeles regulating the manufacture of brick or the manner of conducting or operating brick kilns or brickyards. The only rejoinder made to this allegation in the return to the writ of *habeas corpus* is that by another ordinance the manufacture of brick is prohibited in a certain other district (area not shown), and that by the residence district ordinance all businesses operated by mechanical power are prohibited in certain districts. The extent of these districts does not appear. These regulations are in reality prohibitions. No ordinance has ever been adopted *regulating* the manner of conducting brick-manufacturing plants, although it must be apparent that the same would be more easily regulated than many other factories that are permitted in cities.

In the case of *In re Kelso*, 147 Cal. 609, the court said that by the adoption and enforcement of certain regulations there was no reason why a stone quarry could not be operated without danger to the public safety. The plaintiff in error has invited and continues to invite a reasonable regulation of his business and of the business of other brick manufacturers. *He has, however, resisted the confiscation of his prop-*

erty. The plaintiff in error is in practically the same position as was Kelso in the case above cited. Here is a valuable bed of clay of a particularly fine quality which the owner is prohibited from utilizing by reason of the ordinance in question in this action. He cannot move his clay bed to another location. If reasonable regulations were adopted relative to brick manufacturing there is no reason why the business should not be conducted without the creation of a nuisance. We contend, however, that the city has transcended its power in attempting to place an absolute prohibition upon the brick-making business and particularly when the prohibition extends only to a district covering less than three square miles out of a total area of the city amounting to over 107 square miles.

We are mindful of the trend of the courts during the past few years to uphold ordinances regulating the conduct of business in cities and even ordinances prohibiting entirely the maintenance of certain kinds of businesses. Following this trend the Supreme Court of California in deciding the case at bar, and in upholding the ordinance in question herein, attempted to draw a distinction between the *Kelso case* and the case at bar. We have looked in vain, however, for a real distinction or difference between the two cases. The court in its opinion [Tr. p. 39] states that the ground of the decision in the

Kelso case was that the removal of rock from land is an operation that "may be rendered entirely innocuous by proper regulation," and that therefore a total prohibition was an arbitrary and unreasonable invasion of a private right. The court goes on to say that the burning of brick is a different matter because more or less smoke is necessarily generated.

It is common knowledge, however, that in the operation of a stone quarry it is necessary to drill the rock and to set off blasts of more or less intensity. Thus in the case of a stone quarry we have the noise of the drilling, the noise and dust created by the blasting and the dust caused by the removal and transportation of the rock, and this is constant; while in the case of a brick manufactory no noise is complained of in the mixing and molding of the brick, and no other objectionable features are found except the generation of a certain amount of gas and smoke during the few days that each kiln is being burned. Why could not brick manufacturing "be rendered entirely innocuous by proper regulation"?

In the *Kelso case* the court said on page 612:

"While in the exercise of its police power the state may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. If it does not, it is an unwarrantable invasion of prop-

erty rights, against which the courts will protect."

The court also said:

"A limitation of the use *pro tanto* deprives him of the enjoyment thereof and any arbitrary action in this regard is a taking of private property without due process of law."

Why does not the same rule apply in the case at bar? In each case the owner of the property is removing from his "own land valuable deposits," and each occupation may be so regulated "as to the manner in which such work shall be done" that all valid objections may be met. "An absolute prohibition of such removal under all circumstances cannot be upheld." Such was the language in reference to the blasting and removal of stone. Does not the same rule apply in the present case?

We submit that there is no substantial difference between the *Kelso case* and the case at bar; and we here again call attention to the fact that the property of the plaintiff in error will be rendered entirely useless to him and of practically no value if the ordinance in question should be sustained.

If by the use of proper appliances all gas and smoke can be consumed or absorbed so as not to pass into the atmosphere, then it certainly is beyond the power of the city, by enforcement

of the ordinance, to prevent the plaintiff in error from making lawful use of his property or from utilizing the natural resources thereof.

In the case of *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 62 Am. St. Rep. 532, 37 L. R. A. 381, the court had under consideration an application for an injunction restraining the drilling of a gas well for the purpose of obtaining gas for use in the manufacture of brick and drain tile. In that case the court said:

"It cannot be said that a plant for the manufacture of brick and drain tile, or even a gas well sunk to supply fuel for such a plant, is a nuisance *per se*. The business is lawful, and if located in a proper place and conducted and maintained in a proper manner, neither the plant nor the well can be treated as a nuisance."

In the case of *McCutchen v. Blanton*, 59 Miss. 116, it is said:

"Every doubt should be solved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful and conducive both to individual gain and the general welfare. * * * To interfere with one's right to use his own land for the production of what he pleases, in a case of doubt, would be a flagrant abuse of power."

In the case of *Barnard v. Sherley*, 135 Ind. 547, the court said:

"Mines and mineral springs, natural gas and oil wells cannot be removed; they must

be operated where they are or totally abandoned. Where, therefore, a work is lawful in itself and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little nuisance as may be reasonably expected; and any injury that may result notwithstanding such care in the management of the work must be borne without compensation."

In the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, the court had under consideration the liability of mine owners for the flowage of foul water from the mine into a stream which was the natural water course of the basin in which the mine was situated. In that case the court said:

"The defendants being the owners of the land had a right to mine the coal. It may be stated as a general proposition that *every man has the right to the natural use and enjoyment of his own property*. If while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another without any legal wrong."

In the case of *Phillips v. Lawrence Vitrified Brick & Tile Co.*, 72 Kans. 643, 2 L. R. A. (N. S.) 92, the court held that the development

of the natural resources of one's land by the careful operation of a brick kiln thereon does not render him liable to adjoining property owners for damages, although some injury is done to other property by smoke, dust and cinders, if it is only slight and trivial. In that case the court said:

"The making of brick is a useful and necessary business, and the fact that it may produce some annoyance or discomfort to those near by does not necessarily justify interference or create civil liability. Ordinarily an owner may make a lawful and reasonable use of his property, although it may cause some annoyance and discomfort to those in the vicinity, if such inconvenience and discomfort are only slight and are the natural and necessary consequences of *the exercise of the owner's rights in developing the resources of his property.* * * * The testimony tended to show that the plant is located in a sparsely settled district, that the shale on the land is specially adapted to the manufacture of vitrified brick, and that it is the only place in the community where the shale is found, and also that the chief value of the land is in the shale, and that in the manufacture of brick the defendant was, therefore, only developing the natural resources of its land. Modern methods and appropriate appliances were used by the defendant in the manufacture of the brick, and there was no negligence in the operation of the plant."

Mark the similarity between the case last cited and the case at bar. Here we show that the

district described in the ordinance in question is sparsely settled and contains large tracts of unsubdivided and unoccupied land [Tr. p. 9]; that the brickyard belonging to the plaintiff in error is kept in a clean and sanitary condition; that the manufacture of brick upon the premises is at all times so conducted that there is no disturbance of the peace, quiet or enjoyment of persons residing in the community, and that the business is not a menace to health or safety and does not interfere with the comfortable enjoyment of life or property [Tr. p. 8]; that at an expense of \$25,000.00 the plaintiff in error has placed upon the said property brick-making machinery of modern type and design [Tr. p. 4]; that the land contains a valuable bed of clay suitable to the manufacture of brick of a fine quality, and that the value of the land for brick-making purposes is more than ten times its value for any other purpose. [Tr. p. 3.]

In the case of *In re Smith*, 143 Cal. 368, it was held that the county of Los Angeles did not have power to prohibit the manufacture of gas, though it might in the legitimate exercise of its power regulate its manufacture.

In the case of *Belmont v. New England Brick Co.*, 190 Mass. 442, it is held that an ordinance prohibiting the exercise of the business of excavating clay for the purpose of manufacturing

bricks within the city without a permit and without furnishing a bond conditional upon the observation of the terms of the permit, is unreasonable and void. The court held that the digging of clay and the process of manufacture into bricks was not noxious, and the objection to the stagnation of water in the pits could be remedied without "an impairment of private right *so disproportionate with the gain to the public health as to make it unreasonable, and therefore void.*"

In the case of *Denver v. Rogers*, 46 Colo. 479, 104 Pac. 1042, the court had under consideration an ordinance of the city of Denver which declared to be a nuisance any brickyard where bricks were burned within 1200 feet of any residence without permission from the owner thereof, or within 1200 feet of any public school house or park without permission from the city. The court held the ordinance to be void, and in the course of the opinion said:

"When subjected to the test of reasonableness, this ordinance is so manifestly radical, unjust, and oppressive, while upon the question of its constitutionality its effect is so clearly to take and destroy property without due process of law, that we have no hesitancy in declaring it invalid on both grounds. It is difficult to conceive how a more drastic, radical and extreme municipal law than the one under consideration could be proposed. Under its provisions one of

the most important, useful and necessary industries known to business life, everywhere recognized as lawful and legitimate, confessedly not a nuisance at common law or inherently, in which thousands of dollars are invested and employed, is arbitrarily driven beyond the city limits, and thus largely destroyed, by the mere edict of the city council, upon the occurrence of these two things: First, that such business is either within 1200 feet of a single residence house, or of a city park, or public school house; and, second, in the case of the residence that its owner or occupant, and in the case of the park or school that the city, has not consented to such location. *To accomplish such result it matters not whether such business is in truth detrimental or obnoxious, or whether it is being conducted in a proper, legitimate and innocent way.* The mere statement of the facts upon, and the conditions under which, this ordinance is in effect, as above indicated, is in itself alone a complete refutation of the claim that it is a proper and reasonable one, or a valid exercise by the city of its police power." (Italics ours.)

The court in the last case also held that under a *general* grant of authority the city had no power to pass the ordinance, saying that "such holding would place it within the power of the municipal legislature to strike down and annihilate any business, however harmless and inoffensive in fact."

The case last cited is important for the reason that it deals directly with the inherent character

of brickyards in general and states expressly that they are not an offensive trade. This declaration is made by the court independently of its other discussion concerning the reasonableness of the ordinance itself. Undoubtedly if the Colorado court had deemed a brickyard an offensive trade it would have reached a different conclusion as to the right of the city to exclude the same altogether, directly or indirectly, by restraining its operation at a distance of less than 1200 feet from a residence, school house or park.

In the case of *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205, this court has stated that it belongs to the legislative department to assert the police powers of the state, but

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as the alleged exercise of the police powers of the state. There are of necessity limits beyond which legislation cannot rightfully go."

In the case of *City of Evansville v. Miller*, 146 Ind. 613, it was held that a building partly destroyed by fire may or may not be a nuisance, and it cannot be declared by ordinance to be a nuisance if it is not.

In the case of *Rouse & Smith v. Martin & Flowers*, 75 Ala. 510, 516, 51 Am. Rep. 463, it is held that a cotton ginnery operated by steam

is not a nuisance *per se*, although erected within 80 feet of a residence.

In the case of *Town of Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, it is held that the business of importing and dealing in cast-off clothing may or may not be a nuisance and a municipality may regulate such business but may not prohibit the same entirely.

In the case of *Town of Cuba v. Mississippi Cotton Oil Co.*, 150 Ala. 259, an ordinance was held void that prohibited the maintenance and required the removal of buildings that were used for the storage of cotton seed. The court held that if the buildings or their contents became nuisances, such nuisances might be abated, but that the buildings could not be destroyed; the business carried on in the buildings might be regulated or suppressed, but the buildings could not be required to be demolished.

In the case of *Everett v. City of Council Bluffs*, 46 Iowa 66, the city was incorporated under a special charter which provided that the city council had the "power to declare what shall be a nuisance and to prevent, remove or abate the same." It was held that this general grant of power did not authorize the council to declare anything a nuisance that was not such at common law, or that had not been declared such by statute.

The determination by the legislative body of what is a proper exercise of the police power is neither final nor conclusive, but is subject to the supervision of the courts.

Ex parte Sing Lee, 96 Cal. 354;

Ex parte Whitwell, 98 Cal. 73;

Ruhstrat v. People, 185 Ill. 133, 49 L. R.

A. 181, 76 Am. St. Rep. 30.

The manufacture of brick is not a nuisance *per se*, and such being the case the city of Los Angeles cannot prohibit the maintenance of a brickyard or the place where brick are manufactured unless, by reason of the methods employed, the manufacture of brick at a designated locality becomes a nuisance in fact.

Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984;

Everett v. Council Bluffs, 46 Ia. 66;

Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218;

In re Sam Kee, 31 Fed. 680;

In re Hong Wah, 82 Fed. 623;

Ex parte Whitwell, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152;

Stockton Laundry Case, 26 Fed. 611.

The city council of the city of Los Angeles had no power to anticipate that something might become a nuisance unless by reason of its very existence and independent of the manner in

which it was conducted it was in fact a nuisance. The preventive power of the city over a nuisance can be exercised only in regard to those things which are nuisances in themselves and necessarily so.

Lake View v. Letz, 44 Ill. 81.

It is not within the power of the city of Los Angeles to enforce any ordinance that purports to make a nuisance of that which is not a nuisance *per se*, nor could a declaration in an ordinance make a nuisance of a business unless it in fact was of that character. The ordinance in question declares it to be unlawful to establish or maintain any brickyard or brick kiln or any establishment for the manufacture or burning of brick. In the maintenance of a brickyard or brick kiln certainly no nuisance can be created, and it cannot be determined merely by the passage of an ordinance that the brickyard will become a nuisance. The maintenance of piles of brick for sale and the selling thereof cannot by any stretch of imagination be called a nuisance. It is true that a pile of brick may not be a pleasure to the eye, but it has never been held that a business can be suppressed for esthetic reasons.

2 Dill. Mun. Corp. §695.

Esthetic or artistic considerations alone will not justify, as an exercise of the police power,

radical restrictions of the right of an owner of property to use his property in an ordinary and beneficial way.

Varney & Green v. Williams, 155 Cal. 318.

Huckenstine's Appeal, 70 Pa. St. 102, is particularly apposite here. In that case the land of the appellant had upon it a deposit of fine brick clay which could be made into bricks with profit if done near the pit from which the clay was taken. An effort was made to enjoin Huckenstein from burning the bricks on the field where the clay was obtained. The injunction was refused and it was held that Huckenstein was making only a *reasonable use* of his own land, and the courts would not interfere with him. In that case the court said:

"Brick-making is a useful and necessary employment and must be pursued near to towns and cities where brick are chiefly used. Brick burning, an essential part of the business, is not a nuisance *per se*."

The last mentioned case is cited with approval in *State v. Board of Health*, 16 Mo. App. 8.

The ordinance in question in the case at bar is most sweeping in its inhibition. It not only makes unlawful the burning or manufacture of brick, but the establishment, operation and maintenance of a brickyard as well. If full effect is to be given to the provisions of this

ordinance the plaintiff in error would be subject to arrest and prosecution for each day during which he *stored or sold* brick upon his property for commercial purposes, irrespective of the burning or manufacturing thereof, and he would be liable to such prosecution whether the brick were manufactured upon his property or elsewhere. In fact the complaint upon which the plaintiff in error was arrested charges that the plaintiff in error "did wilfully and unlawfully establish, conduct, operate and maintain a *brick-yard*, brick kiln and establishment, factory and place for the manufacture and burning of brick."

[Tr. p. 25.]

Neither the state nor a municipality can make that a public nuisance which is not such in fact.

Glucose Refining Co. v. Chicago, 138 Fed.
209.

It has always been generally recognized by the courts that life in a city must involve certain sacrifices of personal exclusiveness owing to the mere proximity of individuals, which is the essence of a city. As remarked in the case of *Rhodes v. Dunbar*, 57 Pa. St. 274:

"Shall the owner of property be deprived of its free and profitable use, altogether it may be, because the light and air may not be as pure as a neighbor might desire, or because a laundress may not be able to dry the contents of a washtub quite as satisfactorily, or a housemaid have to dust more

frequently? * * * These are annoyances. * * * incident to a city residence, and if people prefer living in a city they can only do so because of others desiring to do the same thing in sufficient numbers to constitute a city, and then each tacitly undertakes to suffer such annoyances or inconveniences as are incident to that kind of community."

In the case of *Campbell v. Seaman*, 63 N. Y. 568, it was said concerning the same subject:

"Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For this they are compensated by all the advantages of civilized society."

There is no legitimate reason for marking out a certain small district where lawful and necessary industries are outlawed and where individual property is confiscated, for the purpose of adding to the mere esthetic enjoyment of those who are unable to show that they suffer any real or tangible or perceptible injury. As was said in *In re Smith*, 143 Cal. 368:

"To justify the state in thus interposing its authority in behalf of the public it must appear first that the interests of the public generally, *as distinct from those of a particular class*, require such interference."

In the case of *Booth v. Rome W. & O. T. R. Co.*, 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552, it is held that the use of explosives

in blasting on one's own premises does not constitute a nuisance which will create a liability without regard to negligence, where the blasting is the only proper mode of accomplishing the necessary work.

If the grievances can be removed by the aid of science and skill the courts will go no further than to order those things to be done.

Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378.

In the case of *Miller v. City of Webster City*, 94 Iowa 162, the court enjoined the city from maintaining a market place and stock yards *unless* it daily removed the excrement deposited by the live stock and cleaned the place, but denied an injunction restraining the maintenance of the stock yards. The court held that if the actual nuisance could be abated there was no reason for restraining the entire business.

I. UNDER SPECIAL PROVISIONS OF
THE CITY CHARTER THE CITY MAY
“REGULATE,” BUT MAY NOT “SUPPRESS”
OR “PROHIBIT” THE MAINTENANCE OF
BRICKYARDS.

The respondent, when the matter was before the Supreme Court of California, attempted to justify the passage of the ordinance under a provision of the city charter which empowers the city to license and regulate certain professions, trades, callings and occupations. At the time

of the adoption of the ordinance in question the provision of the charter relied upon by the respondent did not specifically refer to brickyards. The ordinance complained of was adopted in April, 1910 [Tr. p. 5] and the charter was amended in 1911, so as to read as quoted by the respondent in his brief in the Supreme Court of California. Section 2 of the city charter enumerates the powers of the city. We set forth herewith the provisions of that section (in so far as the same relates to the power of the city attempted to be exercised here) as the same existed

Prior to 1911

"To license and regulate the carrying on of any and all professions, trades, callings and occupations carried on within the limits of said city, and to fix the amount of license tax thereon to be paid by all persons engaged in such professions, trades, callings or occupations, provide the manner of enforcing the payment of the same; provided, that no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the

As amended in 1911

"To license and regulate the carrying on of any and all professions, trades, callings and occupations not prohibited by law; to fix the amount of license tax thereon, and prescribe the manner of enforcing the payment of the same; *provided*, that no discrimination shall be made between persons engaged in the same business, otherwise than by proportioning the tax to the amount of business done.

tax upon any business to the amount of business done; and to license, regulate, restrain, suppress or prohibit any or all laundries, livery and sale stables, cattle and horse corrals, slaughter - houses, butcher-shops, hawkers, peddlers, pawn - brokers, dance - cellars, melod-eons, shows, circuses, public billiard - tables, bowling and ten-pin alleys, and to suppress and prohibit all faro banks, games of chance, gambling-houses, tables or stands, bawdy-houses, the keeping of bees within the city limits, and any and all obnoxious, offensive, immoral, indecent or disreputable places of business or practice."—
(Statutes 1889, page 457.)

To license, regulate, restrain, suppress, or prohibit any or all laundries, livery and sale stables, cattle and horse corrals, slaughter - houses, butcher-shops, brick yards, dance halls or academies, public billiard or pool halls or tables, bowling and ten-pin alleys, boxing contests, sparring or other exhibitions, shows, circuses, games and amusements.

"To license, regulate or prohibit the construction and use of billboards, signs and fences." — (Statutes 1911, page 2062.)

The provision of the city charter above quoted, as the same existed at the time of the passage of the ordinance in question and at all times prior to 1911, may be divided into three parts, viz.: The city was given power

(1) "*to license and regulate the carrying on*"

of *all* professions, trades, callings and occupations;

(2) "*to license, regulate, restrain, suppress or prohibit*" certain occupations specifically named;

(3) "*to suppress and prohibit*" certain games and businesses also specifically named.

At the time of the adoption of the ordinance in question the power to "restrain, suppress or prohibit" businesses *was limited by the charter* to those businesses that were expressly designated under that power in the foregoing section of the charter. In the amendment of 1911, adopted after the passage of the ordinance, a similar arrangement was continued, with changes in the list of occupations to which restraint, suppression or prohibition might be applied by ordinance.

An analysis of the provision of the charter above quoted demonstrates beyond doubt that those classes of business not specifically named were intended to be placed outside of the power of the city council to "restrain, suppress or prohibit." If there had been any other intention why would the city have been empowered "*to license and regulate* the carrying on of *any and all* professions, trades, callings and occupations," and also in the same section be empowered "*to license, regulate, restrain, suppress or prohibit* any and all laundries," etc. (naming a long list

of callings and occupations), and also “*to suppress and prohibit*” certain other things. If it had been intended that the city council should have the same power over *all businesses*, the section would not have been divided as it is, giving different powers over different occupations. To give any effect to the words “restrain, suppress and prohibit” the word “regulate” as here used must be defined in a narrower sense than might possibly be assigned thereto when standing alone.

The words “regulate,” “restrain,” “suppress” and “prohibit” are not synonymous.

The word “regulate” is derived from the Latin word *rego*, signifying to guide or to direct, through the noun *regula*, meaning rule. “To regulate” is to prescribe a rule for acting; to direct the mode in which a transaction shall be conducted.

Conlin v. Board of Supervisors, 114 Cal. 404, 411.

A regulation presupposes the existence of a right. “To regulate” means to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions or governing principles.

City of Butte v. Paltrovich, 30 Mont. 18, 104 Am. St. Rep. 698.

The words "regulate" and "prohibit" have different and distinct meanings.

Miller v. Jones, 80 Ala. 89, 96.

"To restrain" is to fix the boundaries beyond which a business must not pass, but within which it is free. It means to curb; to check; to repress; to debar; to prevent; to hinder.

Ogden v. Madison, 111 Wis. 413, 55 L. R. A. 506.

"Restrain" is not synonymous with "prohibit" or "suppress."

Emporia v. Volmer, 12 Kans. 622, 630.

"To restrain" is to hold back; to repress; to hold in check. While the subject is not suppressed, it is held in check and under control.

Burlington v. Lawrence, 42 Ia. 681.

"To suppress" is to put a stop to business when the same has actually existed; to put down or to put an end to by force; to prevent; never, therefore, to license or to sanction.

Ogden v. Madison, 111 Wis. 413, 55 L. R. A. 506.

The shade of difference between the meaning of the words "abate" and "suppress" is so fine that the power of punishment cannot be exercised in one case and not in the other.

Nevada v. Hutchins, 59 Ia. 506.

“To prohibit” is to interdite—that is, to stop altogether.

City of Butte v. Paltrovich, 30 Mont. 18,
104 Am. St. Rep. 698.

“To prohibit” is synonymous with “to prevent.”

Ex parte Florence, 78 Ala. 419, 424.

The power “to prohibit” is not included in the power “to regulate.”

Miller v. Jones, 80 Ala. 89, 96;

Cantril v. Sainer, 59 Ia. 26;

In re Hauck, 70 Mich. 396, 407.

The power “to license and regulate” is not the power “to prohibit,” and an attempt to accomplish the latter object under a pretense of regulation cannot be upheld. The right “to prohibit” is entirely separate and distinct from the power “to regulate” and impose a license tax for revenue purposes.

Merced County v. Fleming, 111 Cal. 46.

The power to impose a license tax upon a business cannot be extended to any subject not enumerated in the statute by which the power is conferred.

Merced Co. v. Helm, 102 Cal. 159, 164.

The power "to regulate" does not embrace the power "to prohibit."

In re Hauck, 70 Mich. 396;

State v. Mott, 61 Md. 297, 308, 48 Am.

Rep. 105;

Sweet v. Wabash, 41 Ind. 7, 11;

Bronson v. Oberlin, 41 Ohio St. 476,

483, 52 Am. Rep. 90.

"To regulate" and "to prohibit" are not synonymous.

People v. Gadway, 61 Mich. 285, 1 Am.

St. Rep. 578.

By reference to the definitions hereinbefore given we find that

"To regulate" is to prescribe the rules under which a business may be conducted.

"To restrain" is to hold in check—in other words, to fix the boundaries within which a business may be conducted freely, but beyond which the business may not be conducted at all.

"To suppress" is to put an end to something already in existence.

"To prohibit" is to prevent that which may never have existed.

Referring again to the powers granted by the city charter, the city was empowered "to license and regulate" all businesses, including that of manufacturing brick. No further powers, however, over the business of the plaintiff

in error were possessed by the city at the time of the adoption of the ordinance in question.

At that time the city was empowered "*to regulate*" the business—to provide rules pursuant to which the brick-making business might be conducted. It did not, however, have power "*to restrain*" or "*to suppress*" or "*to prohibit*" the manufacture or the sale of brick.

Our position in this regard is further borne out by the fact that when the section of the charter above quoted was amended in 1911, the word "brickyards" for the first time appeared in the list of those occupations or businesses which the city was empowered to "*restrain, suppress or prohibit.*" (Stats. 1911, page 2062.)

2. THE GENERAL POWERS OF THE CITY UNDER ITS CHARTER, RELATIVE TO THE EXERCISE OF THE POLICE POWER, ARE NOT UNLIMITED.

(A) THE GENERAL PROVISIONS OF THE CHARTER ARE LIMITED BY THE CHARTER ITSELF IN ITS SPECIAL PROVISIONS.

In addition to the provision of the city charter previously discussed we anticipate that counsel for the defendant in error will rely for authority for the ordinance in question here upon subdivision 34 of section 2 of the charter, which empowers the city

"To make and enforce within its limits such local, police, sanitary and other regulations as are deemed expedient to maintain the public peace, protect property, promote the public morals, and to preserve the health of its inhabitants."

It is a familiar rule of statutory construction that "where there are in an act specific provisions relating to a particular subject, they must govern, in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate."

Endlich on Interpretation of Statutes, p.
288;

Frandsen v. County of San Diego, 101
Cal. 317, 321.

The foregoing provision of the charter, broad though it appears to be, is limited and modified by other special provisions. The last quoted section of the charter, standing alone, would undoubtedly be construed as including the entire police power of the state. The power of the courts to limit the exercise of the police power by municipalities will be discussed under a subsequent heading. We shall here discuss only the conflict between special provisions of the charter, each relating to some specific matter,

and the provision last quoted, giving general powers.

First we direct attention to the provisions of subdivision 13 of section 2 of the charter, hereinbefore quoted, which empowers the city "to license and regulate" *all* occupations; to "restrain, suppress or prohibit" *certain* occupations therein specifically named; "to suppress and prohibit" *certain* other occupations also named. We also quote certain other provisions of the charter, giving the same as they existed at the time of the adoption of the ordinance in question, all having to do with the police power and the exercise thereof.

The city is empowered (subdivision 19 of section 2)

"To provide against the existence of filth, garbage and other injurious and inconvenient matter within the city, and for the disposition of the same."

The other provisions of the charter to which we refer are as follows:

"Sec. 24. It shall by ordinance regulate the entrance to and exits from theatres, lecture rooms, churches, public halls, and public buildings of every kind, and prohibit the placing of chairs, benches or other obstructions in the hall, aisles, or open places therein.

* * * * *

"Sec. 27. It shall, by ordinance, regulate, and may prohibit, the keeping of gunpowder, acids, or other explosive, combust-

tible or inflammable material within the limits of the city, or any specified part thereof.

* * * * *

“Sec. 31. The council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wires in the public grounds, streets or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires.

“Sec. 32. It shall, by ordinance, provide for the naming of streets and numbering of houses, and for regulating or preventing the exhibition of banners, flags or placards across the street, or sidewalks, and for regulating or suppressing public criers, advertising, ringing of bells, and other noises.

“It shall, by ordinance, forbid the erection or display on any building or property of the city, of any banner, device or flag of any state or nation except that of the United States, the state of California or the city of Los Angeles. * * *

“Sec. 35. It shall by ordinance prohibit the making up of railroad trains on any of

its streets, and the stopping of any train on any street crossing."

In passing we direct attention to the italicized words in the foregoing sections of the charter for the purpose of further illustrating the point discussed in a previous portion of this brief, to-wit: that throughout the charter the power of the city "*to prohibit*" is made and kept entirely separate and distinct from its power "*to regulate*" and that the power to *prohibit* is not included in, but is in addition to, the power to *regulate*.

All of the sections above quoted are referable to the police power. In the absence of the foregoing provisions of the charter the city would undoubtedly have the right, under the general power granted by the constitution of the state, to do the things enumerated in the said sections. Section 11 of article XI of the constitution of the state of California is as follows:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

This section does not provide that the city *shall* make and enforce such regulations, but only that the city *may* do so. This provision is only permissive and is not mandatory.

The city *may* make, but it is not *compelled* to make or to enforce any police or sanitary

regulations unless it so desires, and it is not required to make or to enforce any such regulations *except such as it chooses to make and to enforce.*

The legislative body of a city having a free-holders' charter may be *limited by charter provision* in the exercise of the police power conferred upon the city by the constitution of the state.

John Rapp & Son v. Kiel, 159 Cal. 702,
709;

In re Pfahler, 150 Cal. 71, 81, 11 L. R.
A. (N. S.) 1092;

People v. Newman, 96 Cal. 605.

In the case of *State v. Ferguson*, 33 N. H. 424, the court had under consideration a question very similar to the one now before us. In that case the court said:

"This statute, like all other legislative acts, is to be so construed that all its parts shall stand if this may be done. For that purpose the meaning of each of its provisions is to be gathered by reading it in connection with all others, and thus construing it in the light of its context. The maxim *ut res magis valeat quam pereat*, applicable no less to statutes than to wills and other instruments of a private character, can be satisfied only by so construing it. * * *

"To hold, then, that the general clause confers the power, is not in effect to expunge these special provisions from the

charter; and not these only, but all the numerous clauses which go to limit and define the precise boundaries of the power to be exercised by the city in the various cases specified for the enacting of by-laws and ordinances. * * *

"The power to make by-laws, when not expressly given, is implied as incident to the very existence of a corporation, *but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified; all others being excluded by implication.* * * *

"The express grant, then, of the power of legislation upon a particular subject, limited by the terms of the grant in respect to its extent or objects and purposes, or in reference to the mode in which it is exercised, may be held, unless the contrary manifestly appears to be the intention of the legislature upon a view of the entire act, to exclude all authority to legislate upon that subject beyond the prescribed limit; and, in the absence of any further authority expressed, upon every other subject. There is nothing in the act to indicate a contrary intention in this case. On the other hand, the precise and carefully defined limitations upon the power conferred to legislate upon the various subjects contained in the special clauses of the act, would seem clearly to indicate that the legislature intended thereby studiously to guard against the exercise of the power by the city beyond the limitations so prescribed. Why were these precise and cautiously worded limitations introduced? It is not a satisfactory answer to say that they

might be swept away as unmeaning and useless by the next clause in the act; the general clause conferring the power to legislate in all cases. If the general clause had been wanting in the charter, it would seem that no power would have existed in the city to enact ordinances or by-laws upon any subject or in relation to any matter not embraced in the catalogue of cases specified in the special clauses as the subject of legislation. That doctrine is well settled upon the authorities and may be well sustained upon principle. It must be understood that the intention in the insertion of the general clause was to remove the implication, which would otherwise arise, to restrain the city from enacting by-laws upon other subjects, and thus to empower them, by virtue of the special provision conferring express powers in the specified cases, to legislate upon those subjects *under the limitations prescribed*, and, by virtue of the general clause, upon all other matters coming within the scope of their municipal authority, subject only to such limitation as the general laws may prescribe."

The court held:

"That the general clause conferring power to make any other by-laws and regulations *was not intended to enlarge or extend the power conferred by the special provisions* in relation to their various subject-matters, but to give the power to make by-laws in relation to such other matters as may properly be the subject of police regulation, and as are not expressly declared to be the subject of municipal legislation by other provisions of the charter." (Italics ours.)

It seems evident that the city has not accepted in full the constitutional offer, and that if it had desired or intended to take unto itself the entire police power of the state without condition and without reservation, it would not in its charter have enumerated by name the many callings, occupations and conditions that it desired to regulate, or the many that it desired to suppress and to prohibit.

The charter was adopted pursuant to section 8 of article XI of the constitution, which provides for the framing of a proposed charter, the submission thereof to a vote of the people of the city, and, after its approval by the people, for its ratification by the legislature. That section of the constitution provides that after approval by the legislature the charter of the city "*shall become the organic law thereof* and supersede any existing charter, and all amendments thereof, and all laws inconsistent with such charter." We maintain, therefore, that when the provisions of the charter herein referred to were adopted by the people they took unto themselves the police power of the state, *subject to the exceptions, conditions and limitations that they chose to place and did place in their organic law—the charter.*

The charter is the organic law of the city.

Constitution of California, art. XI, sec. 8.
Dillon, Mun. Corp. (5th ed.) §237.

The city charter has the same effect as a statute and is to be construed in like manner as a statute.

Sheehan v. Scott, 145 Cal. 684.

In the construction of statutes where general words follow particular ones, the general words should be construed as applicable only to things of the same general class as are mentioned by the particular words.

Phillips v. Christian County, 87 Ill. App. 481.

Where specific and general terms of the same nature are employed in a statute, *whether the latter precede or follow the former*, the general terms take their meaning from the specific, and are presumed to embrace only the subject or things designated by the specific terms.

State v. Fontenot, 112 La. 628.

It is a well settled rule of statutory construction that specific provisions relating to a particular subject must govern, in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it.

In re Rouse, Hazard & Co., 91 Fed. 96,
quoting with approval

Felt v. Felt, 19 Wis. 193.

In the case of *Crane v. Reeder*, 22 Mich. 322, the following rule was stated, and this language was quoted and approved in the case of *Rodgers v. United States*, 185 U. S. 83, 46 L. Ed. 816:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

The general rules of statutory construction must, therefore, apply to the construction of the city charter. Subdivision 22 of section 2 of the charter containing the general powers granted to the city, was adopted at the same time as subdivision 13 of the same section, granting specific powers. Following the general rule of construction, the specific provisions contained in subdivision 13 must govern as against the general provisions contained in subdivision 22. The general provisions referred to, if standing alone, would include the same matter as is included in subdivision 13, and being in conflict with the special provisions, the latter must be taken as

intended to constitute an exception to the general provisions.

Rogers v. United States, 185 U. S. 83, 46 L. Ed. 816, and other cases hereinbefore cited.

Effect must be given to all parts of the charter. If the general provisions should be held to prevail over the special, subdivision 13 of section 2 would be rendered thereby nugatory and useless—a result not to be permitted.

(See cases last herein cited.)

The question arising here is closely analogous to the questions arising under statutory grants of rights or powers. It is a rule frequently asserted, but never disputed, that public grants are to be construed strictly, and that nothing passes thereby by implication. It is also true that the grantee of a statutory or public grant obtains only that portion of the grant that it elects to accept. When the statutory offer is made the grantee may accept the whole or a part of the offer.

In the case of *Northwestern Telephone Exchange Co. v. St. Charles*, 154 Fed. 386, it was held that a statute granting to any telephone or telegraph corporation the right to use the public highways of the state for the purpose of erecting poles, did not authorize any company so to

use any highways of the state other than those occupied by the company at the time of the amendment of the statute. So far as the company had accepted the offer contained in the statute and occupied streets it was permitted to continue after the amendment of the statute, but the court held that it could not obtain any additional rights.

In the case of *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465, 37 L. Ed. 810, it was held that under a similar statute the company had no right to occupy streets not occupied at the time of the withdrawal of the offer contained in the first statute.

Until the offer made in the statute is accepted by direct act, the grantee obtains no rights or privileges.

Capital City etc. Co. v. Tallahassee, 186 U. S. 401, 46 L. Ed. 1219;

Cincinnati etc. Ry. Co. v. Clifford, 113 Ind. 460;

State v. B. & O. Ry. Co., 12 Gill & J. (Md.) 399; (affirmed in 44 U. S. 534, 11 L. Ed. 714);

Nashville etc. Co. v. Davidson, 106 Tenn. 258.

Briefly stated, our position is that although the constitutional offer was general and was lim-

ited only to the extent that cities must conform to general laws in the enforcement of the police power, the city possesses only so much of the police power as it, by its charter, accepted. If the charter had remained silent upon the subject the city would probably have possessed the entire police power of the state, pursuant to the constitution. But when the city in its charter provided for a limited enforcement of the police power, as we find in subdivision 13 of section 2 of the charter, it thereby *set a limitation* upon its acceptance of the constitutional grant, and erected a boundary by and within which it is confined in its power to enact ordinances upon the subjects mentioned in the portion of the charter above mentioned.

In consonance with the rules laid down in these cases, we submit that the general power contained in the charter is limited and circumscribed by the special provisions; that the city's power over businesses and occupations, though it would have been general if subdivision 22 of section 2 had stood alone, *is limited by the special provisions of subdivision 13* of the same section, and that the last mentioned subdivision contains and constitutes the limits of the city's power over the occupations therein enumerated.

As said in the case of *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242, an ordinance not warranted by the city charter is void and can fur-

nish no justification to persons acting under its authority, and therefore if the public authorities move to abate a nuisance or proceed in a manner not authorized by their charter, their act will be illegal.

The enforcement of the ordinance in question would deprive the plaintiff in error of his property without due process of law, because, for the reasons herein stated, the ordinance is not warranted by the city charter and therefore furnishes no justification for the arrest and prosecution of the plaintiff in error. Pursuant to the special provisions contained in subdivision 13 of section 2 of the charter the city may regulate but may not restrain, suppress or prohibit the maintenance of the brickyard.

(B) BOTH GENERAL AND SPECIAL
POWERS OF THE CITY ARE SUBJECT TO
CONSTRUCTION AND LIMITATION BY
THE COURTS.

The public interest cannot be invoked as a justification for demands that pass the limits of reasonable protection and seek to impose unlawful and intolerable burdens.

Northern Pac. Ry. Co. v. North Dakota,
236 U. S. 585.

If the statute has the effect of denying rights secured by the constitution of the United States, they must fail. This court is not bound by the

decisions of the state courts, but *will determine for itself* whether a statute violates the constitution of the United States.

United States v. McReynolds, 235 U. S. 133, 148.

While the language of the charter granting general powers is broad and by its terms assumes to give power to the city to make and enforce such regulations as are "deemed expedient" to protect property and to preserve the health of the inhabitants of the city, yet even the broad term used in the charter, if of any effect at all in the instant case, and the special provisions of the charter, are subject to construction and to limitation by the courts. This language does not give power to the city council by its mere *ipse dixit* to constitute a particular business a nuisance whether the same actually be such or not. Conceding for the purpose only of the argument that the quoted provisions of the charter are applicable and authorize regulation of some character, we take it that by those provisions of the charter the city is given power to declare under what circumstances and conditions certain specific acts and things injurious to the health or dangerous to the public are to constitute and to be deemed nuisances, leaving the question of fact open for judicial determination as to whether the particular thing or act complained of comes within the prohibited class.

As an example, under the authority thus delegated to it by its charter, the city by a general ordinance might declare that any brick-manufacturing plant when conducted contrary to a prescribed manner shall be deemed a nuisance, not that the city council by a mere declaration may arbitrarily prevent the operation of the plant, no matter how well conducted, and take away from a property owner the right to use his property in a lawful manner and to remove therefrom the natural products found therein.

Denver v. Mullen, 7 Colo. 345;
Grossman v. Oakland, 30 Ore. 478, 36 L.
R. A. 593, 60 Am. St. Rep. 832.

The business of the plaintiff in error is not a nuisance *per se*. A plant for the manufacture of brick is not necessarily a nuisance. It is not in its nature inherently a nuisance. It may become a nuisance by reason of the manner of its operation, but if it does so then it may be dealt with in the proper manner.

A nuisance *per se* is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. It has been held that a guano manufactory, though it uses undeodorized, decayed fish in its processes, is not a nuisance *per se*, though it may become such by reason of its location or the manner in which it is conducted.

Duffy v. Meadows Co., 131 N. C. 31.

In the case of *Chicago v. Nettcher*, 183 Ill. 104, 75 Am. St. Rep. 93, it appears that the city had express power to regulate and to fix the place of the sale of meats, fish and other provisions. The Supreme Court of Illinois held invalid an ordinance making it unlawful for any person engaged in selling drygoods, clothing, jewelry and drugs to have exposed for sale fish, meat, or other provisions, holding that such an ordinance was not a health regulation, but was an *arbitrary prohibition* and interfered with the property rights granted by both the state and federal constitutions.

In *McQuillin on Municipal Corporations*, section 356, it is said:

"Ordinarily the power 'to regulate' will not be construed to include the power to prohibit. 'A power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation.' Therefore an ordinance to be valid cannot interfere with lawful employment.

"The cases respecting nuisances fully illustrate this principle. Thus an ordinance was condemned which made it unlawful to work or use for the burning of oyster shells or stone lime any kiln within the city. The court held that the mere burning of lime was not unlawful since it was not a nuisance *per se* irrespective of location, and hence an ordinance could not so declare unless it be a nuisance in fact according to the common law or statutory definition."

State v. Mott, 61 Md. 297.

3. THE ORDINANCE IS UNREASONABLE.

The ordinance is unreasonable because the objectionable portion of the business, if there be such, may be regulated and abated without the necessity of suppressing the business.

Joyce on Nuisances, in section 90, says:

"Where a business can be so carried on that it will not constitute a nuisance an injunction restraining the carrying on of such business will not be issued, but the court will so frame its order that the business may be continued, provided it is so conducted as not to create a nuisance."

This method was followed in *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 173, 26 L. R. A. (N. S.) 183, wherein the defendant was not restrained from continuing its business, but was merely enjoined "from conducting and operating the gas works and manufactory * * * in such a manner as to cause or permit smoke, gases or offensive smells or fumes to be emitted therefrom."

In section 187 of Joyce on Nuisances, it is said:

"If the noise or vibration constituting the nuisance can be avoided by the aid of science and skill, equity will not enjoin the carrying on of the business or enterprise which is the cause of such noises or vibrations, but will require those things to be done which can be done to avoid the in-

jurious consequences. Thus it was so held in the case of noises caused by a corn flouring mill."

In the *Matter of Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, the court said:

"It is quite possible that some things have a greater tendency to produce danger and disorder in the cities than in smaller towns or in rural places. This may justify reasonable precautionary measures, but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. That which is an actual nuisance can be suppressed *just so far as it is noxious*, and its noxious character is the test of its wrongfulness. There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards; and *to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them*, is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power."

So we might say in this case, if the brick-yard is an actual nuisance in any way the *nuisance* can be suppressed—in other words, if

gas or smoke has been or is being emitted from the brick kilns the city has power, by appropriate legislation, to restrain such act. It seems, however, that the city has attempted to adopt "an easy way of getting rid of the trouble of regulating" the brickyard by attempting to suppress the same, which we submit is not only unjust but invalid. The city council by its action, we maintain, has evaded its duty by choosing the apparently simpler method of prohibition rather than regulation.

The ordinance is unreasonable for the reason that if any nuisance has existed the same can be abated by proper legislation less harsh than the suppression and confiscation of the business itself.

Hume v. Laurel Hill Cemetery, 142 Fed.
· 552, 564;

Judson v. Los Angeles Suburban Gas
Co., 157 Cal. 168, 26 L. R. A. (N. S.)
183;

Green v. Lake, 54 Miss. 540, 28 Am.
Rep. 378;

Chamberlain v. Douglas, 48 N. Y. Supp.
710;

Pach v. Geoffrey, 22 N. Y. Supp. 275;
Yocum v. Hotel St. George Co. (N. Y.),
18 Abb. N. C. 340;

Miller v. Webster City, 94 Ia. 162.

Counsel for the defendant in error may reply, and correctly so, that many of the foregoing cases involved the granting or denial of injunctions. Necessity for the existence of society is the foundation both of equity and of the police power. Both are necessary to the preservation of our social structure. Equity interferes by injunction to restrain the maintenance of a nuisance upon the ground that every person must surrender a certain portion of his liberty for the common good and in order that conditions shall not become intolerable to others. For what other purpose is the police power? Both are founded upon the same reasons, but they operate differently—equity at the suit of the individual injured, the police power at the instance of the state—the people as a whole. However, both must be exercised in moderation and with due regard to the rights of all. Not merely the esthetic desires of certain residents are to be considered, but the property rights of those whose entire wealth, much or little though it may be, must be watched with care.

If the fact of any actionable nuisance is established, a court of equity is bound to compare consequences, and if it appears doubtful whether greater injury will not be done by granting than by withholding the injunction, it is the duty of the court to decline to inter-

fer. The law does not regard every trifling injury or annoyance as an actionable nuisance.

The business of operating brickyards and manufacturing brick is a lawful, useful and very necessary occupation. It is not a nuisance *per se*, and may become such only by reason of the manner of its operation.

Huckenstine's Appeal, 70 Pa. St. 102;
State v. Board of Health, 16 Mo. App. 8;
Belmont v. New England Brick Co., 190
Mass. 442;
Phillips v. Lawrence V. B. & T. Co.,
72 Kans. 643, 2 L. R. A. (N. S.) 92.

In the case of *Curran Co. v. Denver*, 47 Colo. 221, the court after citing a number of authorities, quotes with approval the following from *Phillips v. Denver*, 19 Colo. 179:

“An ordinance expressly authorized by specific and definite legislative authority will be upheld unless it conflicts with the constitution of the state or nation; but an ordinance which the municipality assumes to pass by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, *unless it be reasonable, fair and impartial, and not arbitrary or oppressive.*”

As we have hereinbefore said, if the plaintiff in error has been conducting his brickyard in such a manner as to create a nuisance by reason of noises made therein or of gas or smoke

emitted therefrom, the city may forbid the same by an ordinance regulating the manner of conducting the business. It is most unreasonable, however, for the city, without making any effort to regulate the business, to confiscate the entire property by prohibiting its use for the only purpose for which it is valuable in order that persons residing near the brickyard may be avoided some petty nuisance, or in order that their esthetic tastes may be satisfied by having the piles of brick removed.

In determining the validity of an ordinance of this character the court is not limited in its inquiry to a consideration of the matters which appear upon the face of the ordinance. An ordinance of a municipal corporation must be reasonable, even though the municipality is vested with the power to legislate upon the subject in question. An ordinance may look fair upon its face, but when considered in the light of surrounding facts it may be determined to be entirely unreasonable.

The unreasonableness of the ordinance may be determined by an examination of the boundaries of the district described therein. We have hereinbefore called the attention of the court to the size of the district and to its location. The district was laid out without reference to geographical or natural boundaries and without regard to the territory included within

or excluded from the district. This fact alone, we think, shows the intention of the city council to drive the plaintiff in error out of business, regardless of the loss that he may sustain, and the ordinance itself shows that the desire of the council was not so much to protect the public peace, health and safety as to force the plaintiff in error to abandon his valuable property.

Conclusion.

In conclusion we beg to call attention again to the action of the city council in laying out the small district surrounding the property of the plaintiff in error and making it unlawful to maintain brickyards therein.

We submit that the facts as disclosed by the record are sufficient to demonstrate that it was the desire of the council to oust the plaintiff in error from his property, and that the ordinance was aimed personally at him and at his business. In the first place it is absurd to think of laying out a district of less than three square miles in a city containing an area of over 107 square miles and making it unlawful in this small district to maintain brickyards, while making no prohibition or regulation as against brickyards in any other portion of the city. The ordinance was vetoed by the mayor, and in his message to the council he suggested that a similar ordinance be adopted providing that after a date in the fu-

ture the operation of brickyards be prohibited in the district, thus giving the plaintiff in error an opportunity to dispose of his property or to find a location elsewhere, instead of attempting to force him out of business at the end of thirty days after the passage of the ordinance, when the same would become effective. This suggestion was disregarded and the ordinance was immediately passed over the mayor's veto. Several other brickyards are referred to in the record [Tr. pp. 9 and 10], located in other portions of the city, but situated and surrounded in a manner similar to the property of the plaintiff in error, but no attempt has ever been made to suppress the said brickyards, and even after a petition, signed by several hundred persons, was presented to the council asking that the same be regulated or prohibited, no action whatever was taken by the council. We submit that these facts, to say the least, indicate a peculiar condition existing, and a peculiar feeling toward the plaintiff in error that did not extend to his competitors.

We say of the ordinance in question herein, as was said by Justice Sawyer in the Stockton Laundry case, 26 Fed. 611:

"This ordinance does not regulate,—it extinguishes. It absolutely destroys, at its chosen location, an established ordinary bus-

iness, harmless in itself, and indispensable to the comfort of civilized communities, and which cannot be so conveniently, advantageously, or profitably carried on elsewhere."

In fact the business of the plaintiff in error cannot be carried on *at all* elsewhere. If this ordinance is sustained *the business will be extinguished.*

We submit that the ordinance is unconstitutional in that it denies the plaintiff in error the equal protection of the law, for the reasons herein set forth; that the ordinance is unreasonable, and that it deprives the plaintiff in error of his property without due process of law; that the charter authorizes the regulation, but not the suppression or prohibition, of brickyards; that the grant of the police power contained in the constitution of the state of California has been accepted by the city in its city charter only to the limited and qualified extent referred to herein.

This court will examine all of the circumstances surrounding the adoption of such ordinances as the one referred to in this action, and the objects sought to be attained thereby, and therefrom will determine the reasonableness and validity of such ordinances, and whether or not they are oppressive and operate to the unlawful

confiscation of private rights. It is fortunate that the fiat of a city council is not finally determinative of such questions as arise in this action.

The judiciary is the protecting power of the whole government and is charged with the protection of governmental powers, but is none the less charged with the protection of private rights from an unwarranted and unconstitutional assumption of power by municipalities.

We are confident that we have demonstrated that the ordinance in question here has no real or substantial relation to the peace, health, safety or welfare of the public. It is not sufficient to say that if a business or occupation is negligently managed or conducted it will injure the public health and therefore may be entirely suppressed. If a business may be properly conducted and conducted in such a manner as not to be a menace to the public peace, health or safety, but is not so conducted, it is the duty of the municipal authorities, of course, to protect the public, but in so doing they are limited in their powers and must adopt only such measures as are reasonable.

An ordinance entirely prohibiting the owner of property from obtaining therefrom the natural products of his soil, and manufacturing the same

into a necessary and useful article, is unreasonable, and we most respectfully urge that this court should so hold and should reverse the judgment of the Supreme Court of the state of California.

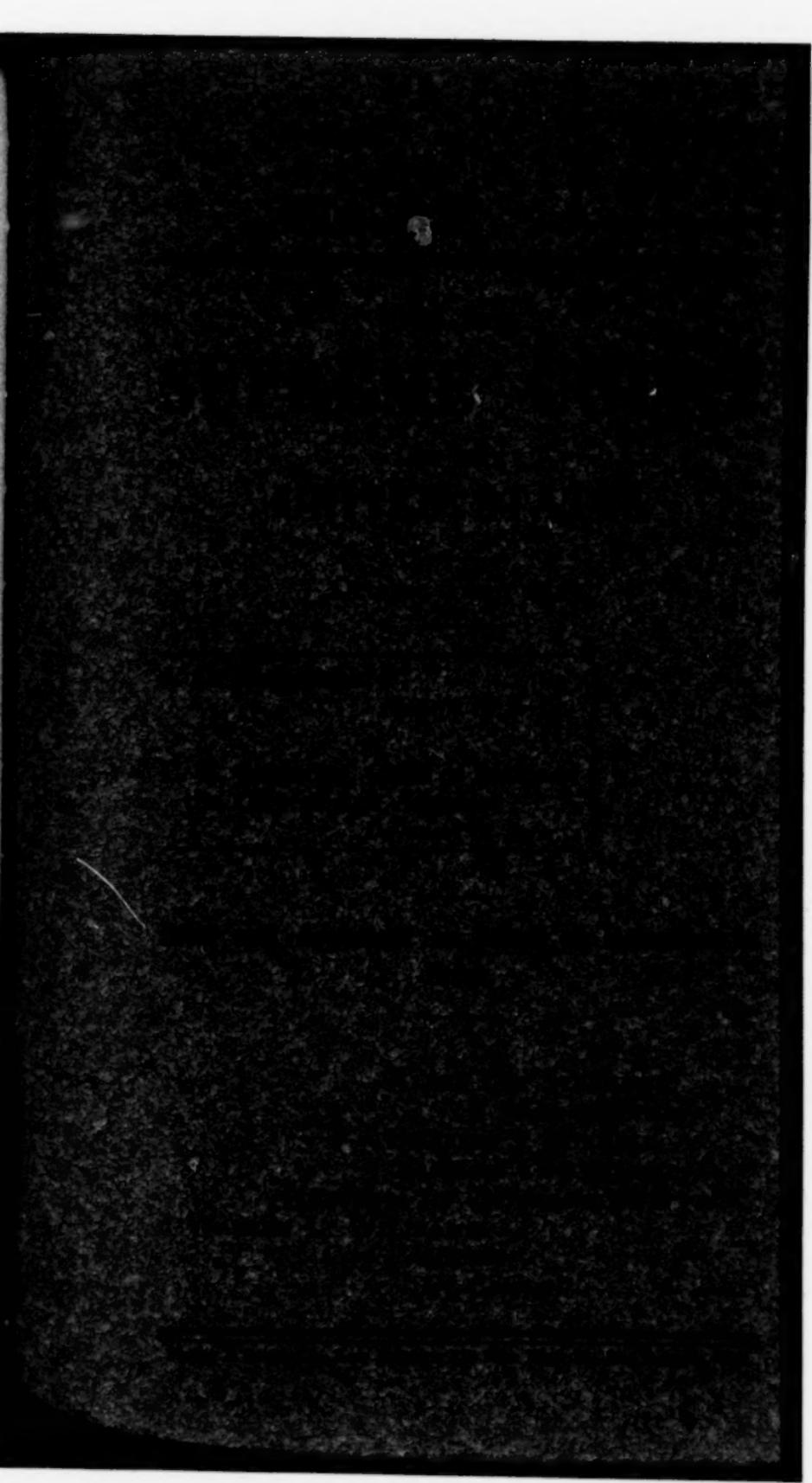
Respectfully submitted,

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G. C. DE GARMO,

Of Counsel.



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IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term 1915.

No. 32.

J. C. Hadacheck,
Plaintiff in Error,
vs.
C. E. Sebastian, Chief of Police of
the City of Los Angeles,
Defendant in Error.

**Brief and Argument on Behalf of Defendant in
Error.**

The question involved here is the validity of an ordinance of the city of Los Angeles prohibiting the maintenance of brick yards in a certain portion of the city of Los Angeles. The plaintiff in error was arrested upon a charge of wilfully and unlawfully conducting, maintaining and operating a brickyard, kiln and establishment within said prohibited district [Tr. pp. 18-25]; he petitioned for a writ of habeas

corpus, which was issued by the Supreme Court of the state of California, and upon the hearing of said petition, and after considering the affidavits presented by the petitioner and by the respondent Chief of Police, and also the petition and the return thereto, the Supreme Court of California, sitting in bank, rendered an opinion upholding the validity of the ordinance, discharging the writ and remanding plaintiff in error to the custody of the respondent Chief of Police. The affidavits referred to will be found in the transcript, pages 26 to 37, inclusive; the petition, pages 1 to 17, inclusive; the return, pages 18 to 25, inclusive, and the opinion of the Supreme Court of California at pages 37 to 41, inclusive.

Defendant in Error's Statement of the Case.

The statement of the case as set forth in the brief of the plaintiff in error, while in the main correct as to the facts, is naturally enough a statement of but one side of the case. Thus while the plaintiff in error states at page 4 of his brief that he purchased the property occupied by his brickyard for the reason that there was thereon situated an extremely valuable body of clay of a kind found only in a very few places in or about the city of Los Angeles, and of a kind difficult to be found in any location where the same could be used for the purpose of man-

ufacturing brick, the record shows [Tr. p. 22, par. XVII, also Tr. p. 24, par. XXII] that the business of making, burning and selling brick is permitted to be conducted in approximately one-third of the area of the city of Los Angeles, which portion is that most naturally adapted to industrial development, and that in said portion there are situated large beds of clay suitable to be utilized for the purpose of brick making. It is set forth in the petition for a writ of habeas corpus [Tr. p. 8] that the city embraces an area of about 107.62 square miles, and it is alleged in the return to the writ that by virtue of various ordinances, including the one here in question, approximately one-third of the area of the city, and that the portion most naturally adapted to industrial development, is open to the business in which the plaintiff in error is engaged [Tr. p. 22, par. XVI and XVII].

It further appears that the industrial districts in which such business may be lawfully carried on are, by reason of their natural location, along or about the bed of the Los Angeles river, and by reason of the fact that they are traversed throughout their length by the three transcontinental railroads entering the city of Los Angeles, fully suitable for the maintenance of brick-yards [Tr. p. 24, par. XXII].

Plaintiff in error refers to the fact that no complaints were ever made regarding the opera-

tion of the brickyard until after the annexation of the surrounding territory to the city of Los Angeles (plaintiff in error's brief, page 5). The territory wherein is located the land and business of plaintiff in error was annexed to the city of Los Angeles in October, 1909 [Tr. p. 4]. The ordinance in question was adopted by the city council of the said city March 22, 1910 [Tr. p. 5]. The complaint upon which the plaintiff in error was prosecuted was filed in the police court October 24, 1912 [Tr. p. 25]. No complaint was ever made or issued, nor could any complaint have been issued by reason of the operation of said brickyard until after the territory in which it was situated became a part of the city of Los Angeles and an ordinance had been adopted making the conducting of a brickyard in said district a misdemeanor.

The plaintiff in error claims that he "at all times conducted his brickyard in a sanitary and lawful manner and in such manner as not to cause annoyance to persons residing in the vicinity." (Brief of plaintiff in error, p. 5.) Apart from the fact that the legislative body of a city is best qualified to judge as to what, if any, occupations should, in the interest of the public welfare, be so regulated as to restrict them to certain districts and prohibit them from being carried on in others, this statement is directly contradicted by the affidavits which

were considered by the Supreme Court of the state of California, and which appear in the record here. Thus in the return of the respondent Chief of Police it is directly denied that the business is not dangerous or detrimental to the health, safety, peace and welfare of the inhabitants of the restricted district and of the city [Tr. p. 19]. It is further denied that the brickyard is kept in a clean and sanitary condition and that the business is so conducted that there is no disturbance of the peace, quiet and enjoyment of any person residing in the community, and it is denied that there is no danger or menace to the health, safety or comfort of citizens resulting therefrom, and that there are no noises, noxious odors or smoke caused by the maintenance of said brickyard [Tr. p. 19, par. IV].

The affidavit of Ida S. Wilson shows that in the brickmaking process carried on upon the premises in question, large quantities of smoke, soot, gas and steam are created which are a constant menace to the health and safety of the occupants of the affiant's dwelling [Tr. p. 26].

W. H. Riley has made affidavit that he and his family have been subjected to great annoyance by reason of the conduct of said business; that his dwelling is contiguous to the property where it is conducted and that for days at a time great clouds of smoke, steam and soot have

been discharged from the brickyard and have penetrated his dwelling in such manner as to menace the health and welfare of his family, and that in addition thereto noxious gases, generated by the combustion of oil which is used to make the bricks, have menaced the health of himself and family, and that not only during the day but late hours of the night these conditions have obtained and have made it necessary to close the windows and have thus prevented ventilation. Also that soot in large quantities has been deposited upon his premises and great clouds of dust blown upon the same [Tr. p. 27].

Aminta B. McGarvin has made affidavit showing that she resides adjacent to the property in question, that the various processes of brick-making are carried on almost continuously upon the premises of the plaintiff in error; that the smoke emitted from said premises spreads about in the immediate neighborhood and that the constant generation of steam causes a continual hissing and penetrating noise, which is intensely annoying and irritating to all of those who live near by. She also avers that her health has been injured by the constant breathing of noxious gases, fumes and smoke, and she details the same condition as to the dust, smoke and noise recited in the affidavits above referred to.

Other affidavits sworn to by Charles L. Moon, Ed Prudhon, E. B. Myers, Bettie B.

Brodin, Frank Heron, Charles M. Hoff and S. P. Mansfield, all of whom are residents within said district, set forth the same conditions and further show that those dwelling in the neighborhood have been deprived of sleep for entire nights at a time by reason of the constant noise from the steam pipes, and bring out the fact that the constant passage of the large wagons used for hauling the brick creates great clouds of dust. These various affidavits are set out in the transcript on pages 26 to 34, both inclusive.

The allegations in the petition for writ of habeas corpus, the denials and counter-allegations in the return, and the affidavits and counter-affidavits which are set forth in the transcript, presented issues of fact as to whether or not the district affected by the ordinance was of such a character that the maintenance of brickyards therein would affect the health, comfort and welfare of the residents thereof, and as to whether or not the occupants of the neighboring property were disturbed in their peaceable enjoyment thereof by the operation of the brickyard, and as to whether the operation thereof produced dust, noise, soot and disagreeable odors. These issues of fact were passed upon by the Supreme Court of the state, which, in effect, made a finding contrary to the contentions of the plaintiff in error.

To quote from the opinion in *Ex parte Hadacheck* [Tr. p. 39]:

"The petition in this case contains allegations designed to show that the district affected by the ordinance complained of was of such a character that the maintenance of brickyards therein could not affect the health or comfort of anyone. But the respondent has added to his return various affidavits tending to show that the region surrounding petitioner's brickyard has become primarily a residential section, and that the occupants of neighboring dwellings are seriously discommoded by the petitioner's operations. The evidence thus before us, when taken in connection with the presumptions in favor of the propriety of the legislative determination, is certainly sufficient to overcome any contention that the prohibition was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business in its present location was so detrimental to the interests of others as to require suppression."

Plaintiff in error lays stress upon the alleged fact that while the area of the city at the time of the adoption of the ordinance in question was about 107.62 square miles, the district affected by the ordinance embraced less than three square miles. While this would appear, in view of the authorities which will be referred to hereinafter, an immaterial circumstance, it is by no means a correct statement of the situation in the city of Los Angeles, for the ordinance in question is not the only ordinance regulating the business

of brickmaking and forbidding its being carried on within certain specified residence districts within the city. For example, another ordinance, No. 13,077 (New Series) prohibits the carrying on of such business within another and much larger district [Tr. p. 22, par. XVI], while ordinance No. 22,798 (New Series), known as the "Residence District Ordinance," and which was adopted in June, 1911 [Tr. p. 22, par. XVI], prohibits within the residence districts of the city the conducting of all businesses where mechanical power, other than five-horsepower motors, is employed, so that approximately two-thirds of the total area of the city of Los Angeles is covered by these various ordinances [Tr. p. 22, par. XVII].

The purpose of these various ordinances is, of course, to protect the residence districts of the city of Los Angeles from menaces to the health, comfort and welfare of the people residing therein, and to restrict the carrying on of occupations which by their very nature are a menace to the health, comfort and safety of the neighborhood in which they are located, to that portion of the city known as the "Industrial District."

The district laid out by the terms of the ordinance in question is exclusively a residence district [Tr. p. 23, par. XVIII], the few business establishments located therein being small shops

and stores such as are incident to every community [Tr. p. 23], and which may be conducted without any of the annoyances and menaces to the health, comfort and safety of the community, such as constant noise, soot, smoke, dust and noxious gases, accompanying the conduct of the brickmaking business. In the district in question no large industries are conducted except by the plaintiff in error and one other concern engaged in the same business [Tr. p. 23, par. XVIII]. Said district is closely built up with beautiful and expensive homes. It is a high and slightly location in one of the most rapidly growing and desirable residence sections in the whole beautiful city of Los Angeles. The premises of the plaintiff in error lie between Woolsey avenue and Crenshaw boulevard, both of which are residence streets [Tr. p. 23, par. XVIII], and the property lines of the residences on said streets abut on one side or the other of the property of the plaintiff in error.

The original return to the writ of habeas corpus filed in the Supreme Court of the state of California is accompanied by photographs of the business location of the plaintiff in error and of the surrounding streets, and these photographs better than anything else, except personal knowledge of the locality, will show this Honorable Court why Los Angeles, as well as every other progressive community, enacts ordinances

such as the one here in question. Los Angeles rightly prides herself on being not only one of the most beautiful cities of the world, but also upon being especially a "city of homes." Conditions here differ from those in many other large cities in that the people, instead of being cooped up in flats and apartment houses, reside, for the most part, in their own homes, for which reason those portions of the city used for residential purposes cover a vastly larger area, in proportion to the total area of the city, than would be the case were the people to crowd into multi-storied flats and apartment houses. The movement to lay out, build and architecturally arrange cities to the best advantage in order that the comfort and well being of their inhabitants may be best served is world wide, and while the individual may be caused to suffer through the use of his property being restricted, we are beginning to see, and the courts are each day more firmly adhering to the principle, that the rights of property do not include the right to so use it as to menace the peace, comfort, health and safety of the neighborhood or to interfere with the enjoyment of others in the use of their own property, or, as the Supreme Court of Indiana has well said:

"Every holder of property holds it under the implied liability that its use may be so regulated that it shall not encroach in-

juriously on the enjoyment of property by others or be injurious to the community."

Pittsburg etc. Ry. Co. v. Chappell, 106
N. E. 403.

Petitioner in error further makes the point, on page 8 of his brief and in his petition for writ of habeas corpus [Tr. p. 9], that numerous other brickyards exist in the city of Los Angeles and outside of the district covered by the ordinance in question, and that they did so exist prior to the adoption of such ordinance, but he does not claim or attempt to show that these brickyards are situated *within* districts in which the carrying on of such occupations is prohibited by the other ordinances hereinbefore referred to, and in the absence of any showing to the contrary it must be presumed that the law has been obeyed and that such establishments are not being maintained in prohibited districts.

It may be true, as respondent in error alleges, that these other brickmaking establishments are carried on in portions of the city in which there are residences, but if said portions of the city have been made industrial districts, in which the carrying on of such an occupation is allowed, the fact that people may choose to continue to reside therein is of no importance. No industrial section in any city in the world is made up exclusively of industrial plants, some resi-

dences will always be found in such districts, generally the residences of those who find employment in the various industries carried on in such sections of the city. Plaintiff in error makes a point of the fact that a petition was presented to the city council relating to another brickyard, and that no action was taken thereon for the purpose of suppressing or prohibiting the operation of such brickyard. This we consider entirely immaterial, first, for the reason that such brickyard may have been in an industrial district, where it had a right to be, and, second, for the reason that the city council was clothed with the power to determine in its sound discretion what parts of the city should be set apart for residence purposes, and what parts for industrial purposes.

BRIEF.

First we respectfully submit for the attention of this Honorable Court the opinions and decisions of the Supreme Court of the state of California upon the case here under consideration:

Ex parte J. C. Hadacheck, 165 Cal. 416
[Tr. p. 37];
Hadacheck v. Alexander, 147 Pac. 259.

Also other decisions of said court passing upon the validity of similar ordinances pro-

hibiting the maintenance of certain classes of business in residence districts.

Ex parte Quong Wo, 161 Cal. 220;
Grumbach v. Lelande, 154 Cal. 679;
In re Montgomery, 163 Cal. 457;
In re Linehan, 72 Cal. 114.

The police power extends to all the great public needs.

Canfield v. U. S., 167 U. S. 518;
Bacon v. Walker, 204 U. S. 311, 317;
C. B. & Q. R. R. Co. v. Drainage Commrs., 200 U. S. 592;
Noble State Bank v. Haskell, 219 U. S. 104;
Lake Shore Rwy. Co. v. Ohio, 173 U. S. 285;
Thorpe v. Rwy. Co., 27 Vt. 140;
Pound v. Turck, 96 U. S. 464;
R. R. Co. v. Husen, 96 U. S. 470;
German Alliance Ins. Co. v. Kansas, 233 U. S. 389;
Bracey v. Darst, 218 Fed. 98.

Under what circumstances the police power should be exercised to prohibit the conduct of certain classes of business within a certain district is a matter of police regulation for the municipal authorities.

City of New Orleans v. Murat, 119 La. 1093, 44 So. 898;
Barbier v. Connolly, 113 U. S. 27;
Soon Hing v. Crowley, 113 U. S. 703.

It is primarily for the legislative body clothed with the proper power, to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances and of the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation.

- Ex parte Hadacheck*, 165 Cal. 416;
Ex parte Quong Wo, 161 Cal. 220, 230;
State *ex rel.* Krittenbrink v. Withnell
(Neb.), 135 N. W. 376;
Ex parte Montgomery, 163 Cal. 457;
Odd Fellows Cemetery Ass'n. v. San
Francisco, 140 Cal. 226;
Laurel Hill Cemetery Ass'n. v. San Fran-
cisco, 152 Cal. 464;
In re Smith, 143 Cal. 370;
Ex parte Tuttle, 91 Cal. 589, 591;
Mo. Pac. R. R. Co. v. Omaha, 235 U. S.
121;
German Alliance Ins. Co. v. Kansas, 233
U. S. 389, 414.

The reasons actuating the legislative body in enacting the regulation need not necessarily appear from a reading of the ordinance itself.

Grumbach v. Lelande, 154 Cal. 685.

"Except where the court can see in the light of facts properly brought to its knowledge that a given police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to preserve or protect the public safety, health, comfort, or morals, the decision of the legislative body as to the necessity or reasonableness of the regulation in question is conclusive."

Odd Fellows Cemetery Ass'n. v. San Francisco, 140 Cal. 226, 233;
Ex parte Tuttle, 91 Cal. 589, 591;
In re Zhizhuzza, 147 Cal. 328, 334.

The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil, and the exercise of the police power may and should have reference to the particular situation and needs of the community.

Ohio Co. v. Ind., 177 U. S. 190;
Clark v. Nash, 198 U. S. 361;
Strickly v. Highland Co., 200 U. S. 527;
Offield v. N. Y. Co., 203 U. S. 372;
McLean v. Denver, 203 U. S. 38;
Brown v. Walling, 204 U. S. 320;
Bacon v. Walker, 204 U. S. 311;
Plessy v. Ferguson, 163 U. S. 537;
Welch v. Sweney, 23 L. R. A. (N. S.) 1160.

It is not necessary that a business be a nuisance *per se* to be regulated.

Ex parte Lacey, 108 Cal. 326;

Ex parte Quong Wo, 161 Cal. 220 (particular attention being called to the opinion of Mr. Justice Angellotti on page 228);

Moses v. U. S., 16 App. Cas. D. C., 428;

Rhodes v. Dunbar, 57 Pa. St. 275;

Breadman v. Tredwell, 31 Law Journal (N. S.), 873;

Bassham v. Hall, 22 Law Times, 116;

Bumford v. Tumley, 2 B. & S. (Q. B.) 62;

Campbell v. Seaman, 63 N. Y. 568.

The question whether the classification of subjects for the exercise of police power is proper is not to be determined upon hard and fast rules, but must be answered after a consideration of the particular subject of litigation.

Ex parte Stoltenberg, 134 Pac. 971.

Whenever a thing or act is of such a nature that it may become injurious to the welfare of the community if not suppressed or regulated, the legislative body may, in the exercise of its police power, make and enforce ordinances to regulate or prohibit, although it may never have been offensive or injurious in the past. * * * The exercise of this power is not limited to reg-

ulation of such things as may have already become nuisances.

Odd Fellows Cemetery Ass'n. v. San Francisco, 140 Cal. 226, 231.

The length of time during which a business has existed in a certain locality does not make its prohibition for the future unconstitutional.

Tiedeman State and Fed. Control of Persons and Property;

Russell v. Beatty, 16 Mo. App. 131;

Sedgwick's Stat. and Const. Law, 434;

C. B. & Q. R. R. Co. v. Drainage Commrs., 200 U. S. 592;

Freund on Police Power, Sec. 529;

Case of Morskettle, 16 Mo. App. 8;

Powell v. The Brookfield Pressed Brick Co., 78 S. W. Rep. at page 648;

Bushnell v. Robinson, 62 Iowa 542;

Baltimore v. Fairfield, 87 Md. 352;

Harmison v. Lewiston, 46 Ill. App. 164;

Commonwealth v. Upton, 6 Gray, 473;

Rhodes v. Dunbar, 57 Pa. St. 257;

People v. Detroit Lead Works, 82 Mich.

471.

Where the police power restricts constitutional rights, particularly as to property, the

value of that property is not material to the issue.

Mugler v. Kansas, 123 U. S. 623;
Grumbach v. Lelande, 145 Cal. 684;
Western Indemnity Co. v. Pillsbury, de-
cided Sept. 2, 1915, Vol. 50 (No. 2654)
Cal. Dec. 291;
Erie R. R. Co. v. Williams, 233 U. S.
685, 700.

The size of the territory affected by the ordinance is no criterion by which to be guided in judging of its discriminatory qualities.

Ex parte Quong Wo, 161 Cal. 226;
Ex parte Martin, 127 Cal. 57;
Ex parte Miller, 162 Cal. 687;
Miller v. Wilson, 236 U. S. 373.

That a statute will result in injury to some private interest does not deprive the legislature of power to enact it, though a statute is invalid where its purpose is primarily the destruction of property.

Enos v. Hanff, 152 N. W. 397.

The character and value of property contiguous to the business of plaintiff in error is very much to be considered.

State *ex rel.* Krittenbrink v. Withnell,
135 N. W. 376.

That similar conditions exist in other localities is no reason why an ordinance regulating and equally affecting every one in a given locality should be declared unconstitutional.

Ex parte Tuttle, 91 Cal. 589, 591;

In re Smith, 143 Cal. 370;

In re Zhizhuzza, 147 Cal. 328, 334;

Ex parte Quong Wo, 161 Cal. 220.

A statute enacted within the police power will not be adjudged invalid merely because omitted cases might have been properly included in the statute.

People v. Charles Schweinler Press, 214

N. Y. 395, 108 N. E. 639;

People *ex rel.* Krohn v. Warden, 152 N. Y. Supp. 1136;

State v. Olson, 26 N. D. 304, 144 N. W. 661.

"People residing in cities are entitled to enjoy their homes free from the damaging results of smoke, soot, and cinders, if sufficient to depreciate the value of their property and render its occupancy uncomfortable."

King v. Vicksburg Rwy., 88 Miss. 456, 117 Am. St. Rep. 749;

Rochester v. Macauley-Fien Co., 199 N. Y. 207.

Every holder of property holds it under the implied liability that its use may be so regu-

lated that it shall not encroach injuriously on the enjoyment of property by others or be injurious to the community.

Pittsburg etc. Ry. Co. v. Chappell, 106 N. E. (Ind.) 403.

Brick yards and brick manufacturing plants, as well as all businesses which require the generation of smoke, soot, and gas, have universally been held to be objectionable and may be enjoined or regulated.

State *ex rel.* Krittenbrink v. Withnell, 135 N. W. 376, Sup. Ct., Neb.;

Susquehanna Fertilizer Co. v. Malone, 25 Am. St. Rep. 596;

Booth v. Nome etc. R. R. Co., 37 Am. St. Rep. 552, 558;

McMorran v. Fitzgerald, 106 Mich. 649, 58 Am. St. Rep. 511;

King v. Vicksburg Rwy., 117 Am. St. Rep. 749;

Rochester v. Macauley-Fien Co., 199 N. Y. 207.

"It is immaterial whether injury from gases emitted from brick-kilns is only occasional."

Powell v. Brookfield Pressed Brick Co., 78 S. W. Rep. 648;

Odd Fellows Cemetery Ass'n. v. San Francisco, 140 Cal. 226;

Kirchgraber v. Lloyd, 59 Mo. App. 59.

The Supreme Court of California has determined *as a fact*, after considering the evidence (consisting of the affidavits and counter-affidavits accompanying the petition and return), that the district surrounding petitioner's brick-yard has become primarily a residence section and that the occupants of neighboring dwellings are seriously discommodeed by petitioner's operations.

Ex parte Hadacheck, 165 Cal. 416 [Tr. p. 39].

The presumption is in favor of the validity of the ordinance and this presumption has not been rebutted by any evidence produced by plaintiff in error, but on the contrary the evidence presented at the hearing of the petition for writ of habeas corpus, by way of affidavits, shows that the ordinance was one that was necessary for the protection of the public health, comfort, safety and welfare.

Ex parte Hadacheck, 165 Cal. 416 [Tr. p. 39].

It is well settled that prohibition of industries in certain sections of cities is but a regulation, and is always so treated.

Ex parte Byrd, 54 Ala. 17;

In re Wilson, 32 Minn. 145;

Shea v. City of Muncie, 148 Ind. 14;

Cronin v. People, 82 N. Y. 318;

City of Newton v. Joyce, 166 Mass. 83;
Ex parte Quong Wo, 161 Cal. 231;
City of Little Rock v. Rineman (Ark.),
155 S. W. 105;
City of St. Louis v. Russell, 116 Mo.
248, 22 S. W. 470;
Ex parte Botts (Texas), 154 S. W. 221.

The city has the right to regulate an occupation by confining the conducting thereof within prescribed limits.

Ex parte Quong Wo, 161 Cal. 220;
In re Montgomery, 163 Cal. 457;
Grumbach v. Lelande, 154 Cal. 679;
In re Linehan, 72 Cal. 114;
Ex parte Lacey, 104 Cal. 326;
White v. Bracelin, 144 Mich. 332, 107
N. W. 1055;
Stram v. City of Galesburg, 203 Ill. 234,
67 N. E. 836;
Shea v. City of Muncie, 148 Ind. 14,
46 N. E. 138;
City of New Orleans v. Murat, 119 La.
1093, 44 So. 898;
City of Little Rock v. Rineman, 155 S.
W. 105;
City of St. Louis v. Russell, 116 Mo. 248,
22 S. W. 470;
Ex parte Botts, 154 S. W. 221;
Barbier v. Connolly, 113 U. S. 27;
Soon Hing v. Crowley, 113 U. S. 703.

ARGUMENT.

I.

Right of Individual to Use his Property as he Pleases is Subordinate to Welfare of Com- munity.

The plaintiff in error apparently rests his case upon the principle that one who owns property possesses the right to use it for the purposes of conducting thereon any lawful occupation, and that it is not within the power of the community to interfere with such use, but that he should be permitted to enjoy to the fullest extent every lawful use to which his property may be put. There can be no question of the soundness of this principle, but like many another sound principle it is not, and should not be, of universal application and subject to no exceptions. Other persons owning property in a community are equally entitled to the full use and enjoyment of *their* property, and when any business or occupation is conducted in such manner as to interfere with the rights of others, and with the peace, health, comfort and safety of the community, it is within the police power of the community to so regulate it as to prevent its interference with the rights of others even if the nature of the business is such that the regulation must necessarily consist in requiring that its conduct be confined to certain specified dis-

tricts within the community. The whole foundation upon which rests organized society is the preservation of the peace, health, safety, morals, comfort and welfare of the community, and these things are and must ever be paramount to the rights of the individual; any other condition would be anarchy. There can be no more reason why one who owns land in a community should be allowed to conduct thereon an occupation which interferes with the lawful use by his neighbors of *their* land, than why those neighbors should not be entitled to the uninterrupted use and enjoyment of *their* property. Ownership of land cannot and does not necessarily include the right to create thereon dust, smoke, soot and noxious gases and vile odors which are disseminated throughout the neighborhood. Neither does it include the right to make noises which interfere with the comfort of those residing in the vicinity. As this Honorable Court has said:

“The police power embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, morals, or safety.”

Bacon v. Walker, 204 U. S. 311, 317;

C. B. & Q. Co. v. Drainage Commrs., 200
U. S. 592;

Bracey v. Durst, 218 Fed. 498.

Even if, as in the case of the brickyard conducted by the plaintiff in error, a business has been established long prior to the building up of that section of a city wherein it is being conducted, and at a time when the surrounding land was uninhabited and no annoyance could be caused to anyone, the building up of the surrounding territory into a portion of an urban community may necessitate the prohibition of the carrying on of such occupation.

"When, after the establishment of a business, the adjacent land is utilized by owners for residence purposes, or when its continuance becomes a nuisance, the business must give way to the rights of the public, and those prosecuting it must devise some means to avoid the nuisance, or must remove or discontinue such business."

People v. Detroit Lead Works, 82 Mich.
471.

"Many laws which it would be in vain to ask the courts to overthrow, could be shown easily enough to transgress a scholastic interpretation of one or another of the great guarantees of the bill of rights. They more or less limit the liberty of individuals, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the state is limited by the Constitution of the United States, judges should be slow to read into

the law a *nihilimus mutare* as against the law-making power."

Noble State Bank v. Haskell, 219 U. S. 104.

Plaintiff in error contends that a brick manufacturing plant, like a stone quarry, an oil well and a mine, must be carried on at the source of supply, and cites as authority for his contention *In re Kelso*, 147 Cal. 609, in which the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco. The ground of the decision in that case was that the removal of rock from land is an operation that may be rendered entirely innocuous by proper regulation prescribing the manner of doing the work, and that therefore a total prohibition was an arbitrary and unreasonable invasion of private right. The Supreme Court of the state of California in its opinion in the case here under consideration, referred to and distinguished the Kelso case as to the point relied on by the plaintiff in error here, and said [Tr. p. 39]:

"But the burning of brick, in the course of which more or less smoke is necessarily generated and released, is a different matter. Whether or not this trade, however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the dis-

trict, is certainly a question upon which reasonable minds may differ. If this is so, the propriety of entirely prohibiting the occupation within such districts is one for the legislative determination. The courts will not substitute their judgment upon this issue for that of the legislative body."

The Kelso case has been so frequently distinguished by the later decisions of the Supreme Court of California that it can hardly be regarded as authority at the present day. While it may be true that a brickmaking business cannot be profitably and successfully carried on except at or near the source of supply of clay used in making bricks, that fact does not present, to our minds at least, a strong argument in favor of the position taken by respondent in error. It is not a question of the convenience or inconvenience of the plaintiff in error; it is not a question of the amount or degree of financial loss that may be entailed upon him by the enforced cessation of his business at its present location. It is rather a matter involving the comfort, convenience, health and general welfare of the community, and these may not be disregarded by the individual on the plea that his loss will be great if he is forced to cease his business because of its interference therewith.

II.

**Enactments of the Character Herein in Question
Have Been Repeatedly, Especially of Late
Years, Sustained by the Courts Throughout
the Country.**

In Ex parte Quong Wo, 161 Cal. 220, the Supreme Court of California held that the city of Los Angeles has the power by ordinance to divide its territorial limits into industrial and residential districts, and by subsequent ordinances to change the boundaries thereof, and to regulate occupations by restricting their conduct to industrial districts and prohibiting them from being carried on in residential districts, there being nothing to indicate that the distinctions made with reference to the particular localities affected were unreasonable, and the ordinances making no unlawful discrimination between persons or classes of persons, but applying equally and uniformly to all of those engaged in the particular kinds of business prohibited. It was further held that it is primarily for the city council to determine when such regulations are essential, and that such determination on its part,—in view of its better knowledge of the circumstances and of the fact that it has presumably acted with a due regard for the rights of all parties,—will never be disturbed by the courts unless it can be seen that the regulation in question has no relation to the preservation of

the public health, peace, morals, safety, comfort or welfare, but is a clear invasion of personal or property rights under the guise of a police regulation.

In re Montgomery, 163 Cal. 457, the court held that an ordinance of the city of Los Angeles prohibiting the maintenance within the residential districts thereof, as defined by ordinance, of certain enumerated occupations, was a legitimate and constitutional exercise of the city's police power.

In Ex parte Lacey, 108 Cal. 326, an ordinance of the city of Los Angeles prohibiting the establishment or conducting of steam carpet beating machines within a specified distance of any church, schoolhouse or residence, was upheld as a valid exercise of the police power.

In City of New Orleans v. Murat, 119 La. 1093, 44 So. 898, the Supreme Court of Louisiana upheld the right of the city to prohibit by ordinance the carrying on of dairies within certain prescribed limits. The defendant in that case contended, just as the plaintiff in error here contends, that by reason of his having established his business in territory which was then not included within the proscribed limits, and having expended money in the improvement of his property, he had acquired a vested right

to maintain his business in that location, but the court held that his position was untenable; all property being held subject to the preeminent right of the public safety and health. The court also held that the just right of a person to engage in any trade, profession or business, is always subject to the power inherent in the state to make all rules and regulations respecting the use and enjoyment of property or property rights which may be necessary for the protection of the public health, comfort, morals, safety and welfare, and that such regulations cannot be said to deprive the owner of property without due process of law. It was further said that under what circumstances the police power should be exercised to prohibit the conduct of certain classes of business within a certain territory is a matter of police regulation, which must be disposed of by the proper municipal authorities.

In the City of Little Rock v. Rineman (Ark.), 155 S. W. 105, the Supreme Court of the state of Arkansas had before it an ordinance almost identical with that we are now considering. It provided:

“That it shall be unlawful for any person, firm or corporation to conduct or carry on a *livery stable* business within the following area, to-wit, (describing a certain restricted district).”

It was contended that the ordinance was invalid, first, because it prohibited the operation of a lawful business which is not *per se* a public nuisance, within a district wherein appellant's business had long been conducted, and deprived him of his property without due process of law; secondly, that it deprived appellant of the equal protection of the law, and was an unjust discrimination.

The court held:

"The state has the right, under its police power, to make regulations, relative to the carrying on of certain lawful pursuits, trades and business; and as said by the United States Supreme Court in *Williams v. Arkansas*, 217 U. S. 88, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865, quoting from a former decision in *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country; and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with, or destroyed without due process of law, they do not extend beyond

the power of the state to pass, and they form no subject for federal interference.'

"The state, in the exercise of its police power, has given to the city the power to regulate certain callings, pursuits, trades and business, as specified in said section of the statutes.

"The power to regulate gives authority to impose restrictions and restraints upon the business or trade regulated. 'Regulate' means 'to direct by rule or restriction, to subject to governing principles or laws.' Webster's Dictionary. In *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659, the court said: 'To regulate is to govern by or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted.' *Cronin v. Peoples*, 82 N. Y. 318.

"Judge Dillon says: 'To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint certainly within reasonable limits, as to the manner of conducting a specific business, and also as to the building or erection in or upon which the business is to be conducted. BY VIRTUE OF THE POWER TO REGULATE, IT HAS BEEN HELD THAT THE CITY COUNCIL MAY BY ORDINANCE PROHIBIT THE CARRYING ON OF A BUSINESS WITHIN CERTAIN SPECIFIED PORTIONS OF THE CITY. By virtue of a similar power, it has been held that it is within the authority of the common council reasonably to limit the manner by prohibiting one or more meth-

ods. * * *, 2 Dillon on Municipal Corporations (5th Ed.), par. 665.

"*In re Wilson*, 32 Minn. 148, 19 N. W. 724, the court said:

"Under a grant of police power to regulate, the right of municipal authority to determine where and within what limits a certain class of business may be conducted has been often sustained. For example, the place where markets may be held, butcher stalls or meat shops kept * * * the limits within which certain kinds of animals shall not be kept, the distance from a church within which liquor shall not be sold,' etc.

"In *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, the Supreme Court of Missouri, passing upon the validity of an ordinance enacted by the city of St. Louis under its charter giving it the power to license, tax and regulate livery and sales stables, said: 'The first question for our consideration is whether or not the power to regulate livery and sales stables includes the right to designate the places and in what part of the city they may be located, and to prohibit their erection at other places'—and further, after quoting from other cases: 'We think that the city has the power, under its charter and ordinances, to regulate the place of building livery stables and confine them to certain localities within the corporate limits, as well as to regulate the manner of their keeping, as to cleanliness, that they may not be or become obnoxious and deleterious to the health of her citizens.'

"Although it is true, as claimed by appellee, that a livery stable is not *per se* a

public nuisance, and is recognized as a necessary and legitimate business, still the ordinance does not attempt to prohibit the operation of the business within the limits of the city, but only within the small area defined therein; and the city, having express authority to regulate all livery stables, could make the restrictions notwithstanding the business regulated is not a nuisance *per se*.

"McQuillin says: 'While a livery stable in a populous community is not *per se* a public nuisance, it may become such; and hence it has long been recognized as a subject necessarily within the reasonable police regulations. *Power to regulate livery stables and sales stables includes the power to limit them to certain localities*, and provide for their cleanliness so that they may not become injurious to health.' 3 McQuillin, Municipal Corporations, Par. 9, 10.

"In *Ex parte Lacy*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 610, 49 Am. St. Rep. 93, the court, construing an ordinance in which the city attempted to regulate the beating of carpets by steam power, said: 'Conceding the business covered by the provisions of this ordinance not to constitute a nuisance *per se*, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance *per se*, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances *per se*, the general laws of the state are ample to deal with them. But the business here involved may be properly classed with livery stables, soap and glue factories, etc., a class of business undertakings in the conduct of which

police and sanitary regulations are made to a greater or less degree in every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say: "I am committing no nuisance, and insist upon being heard before a court or jury upon that question of fact." In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities and decided against petitioner and all others similarly situated.'

"The livery stable has long been a business well-nigh universally recognized and regarded as belonging to a class subject to police regulation for the protection of the public health and the promotion of the general welfare, and appellees necessarily knew, in engaging in such business, that it was subject to reasonable regulation by the state and by the city under authority from the state.

"The ordinance in question does not attempt to prohibit the carrying on of the business, but only to restrict and limit it to a certain defined territory, or rather to prohibit the operation of it within the small prescribed area or district included in the ordinance. It does not amount to a prohibition of the business; nor was it necessary to show that the business, as conducted, amounted to a nuisance before it was subject to the provisions of this ordinance regulating it. The power to regulate is expressly given by the statute, and reasonably includes, as already said, the right to limit and confine the operation of such business

to certain territory, and to prohibit the carrying of it on in certain other territory, which the city council, by the authority of the state, was left the power to select in the exercise of a reasonable discretion. The power having been vested in the city and duly exercised by its council in the passage of the ordinance, the question is settled thereby for the necessity of the regulation. It is not unreasonable or an undue restraint upon a lawful trade or business, nor an improper restraint upon the lawful and beneficial use of private property. It is contended, further, that there are other ordinances, requiring the securing of a permit from certain city officials, before a livery stable business can be conducted in other portions of the city, outside of this restricted limit or district, and that such ordinances, with the probable action of the city officers thereunder, and this ordinance, making such restrictions, amount to a prohibition of the business in the entire city.

"We have no question, however, of that kind here, and it will be time enough to determine it when it shall come before us. Neither do we think it provides an arbitrary or unjust classification of business for the purpose of regulation. The city council doubtless passed the ordinance to meet and remedy a condition actually existing; and if it be conceded that it had power to regulate likewise 'sales stables,' and if they cannot be reasonably included within the term 'livery stables' as a business usually conducted with and incidental thereto, still there is discretion left to the council in making the classification, and we do not regard it as unjustly discriminative. It operates alike

upon all persons similarly situated within the territory defined; and the council had the right to pass it, even if it should not meet all possible conditions that might exist, as said in Ozan Lumber Co. v. Union City Bank, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195: 'It is almost impossible in some matters to foresee and provide for every imaginable and exceptional case, and the legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things.' See also Williams v. State, 85 Ark. 464, 108 S. W. 838, 122 Am. St. Rep. 47, 26 L. R. A. (N. S.) 482." (Italics ours.)

We have quoted from this opinion at length for the reason that it conclusively answers all the contentions of plaintiff in error in this case.

In City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, the power of the city to regulate livery and sales stables by designating certain districts from which their conduct was excluded, was upheld, although the particular ordinance in question in that case was held invalid for the reason that it attempted to delegate to the neigh-

boring property owners the right to determine whether such business might be conducted in any particular block.

In *Ex parte Botts*, 154 S. W. 221, an ordinance restricting the keeping of hogs within the city to certain limits, which excluded the business section and a portion of the residence section of the city, was upheld.

The Supreme Court of the state of Nebraska, in *State ex rel. Krittenbrink v. Withnell* (135 N. W. 376), in considering a city ordinance of the city of Omaha which in part provided that "It shall be unlawful for any person, firm or corporation to erect or construct within the city of Omaha any kiln or oven to be used in the manufacture of brick," said:

"Under the authority thus conferred, the city council, in passing the ordinance, obviously intended to exercise the police power of the city, and the courts should not interfere with its enforcement unless its unreasonableness, or the want of a necessity for such a measure, is shown by satisfactory evidence. *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 112 Am. St. Rep. 651.

"It will be presumed that the city council in passing the ordinance acted with full knowledge of the conditions relating to the subject of brick kilns located within the city limits. The reasons of public policy which prompted the city lawmakers to pass the ordinance may not appear on the face of

the legislation, or in relator's petition, or in the evidence adduced at the trial of the case. *Gardiner v. City of Omaha*, 85 Neb. 681, 124 N. W. 105. The inquiry, therefore, is not necessarily limited to the city's authority to prevent or abate nuisances, but extends to every phase of police power delegated in any form to the municipality.

* * *

"Relator has not yet constructed his kiln, and the testimony adduced to show that it would not become a nuisance is based largely on observations of existing kilns operated according to the modern method described in his plans and evidence. According to the proofs, the volume and character of the smoke will be less objectionable under the new process, but the stack will emit smoke of a light color continually. The fair inference from all the evidence is that black smoke in great volume will escape at intervals under ordinary management of the plant. It is undisputed that clay, excavated on the premises, and coal, ashes, and brick, in vast quantities, will be handled there. Teams and men will be required for that purpose. The fact that the wind in this climate will carry dust and soot long distances at times cannot be disproved. On one side of the kiln site an addition to the city is rapidly being occupied by valuable residences, and there is no factory in the immediate neighborhood. The proofs show that there are 13 houses within two blocks of relator's land and a witness for defendant testified that within five blocks there were 20 or 30 families. Smoke alone may amount to a nuisance, where it materially interferes with the com-

fort of human existence in the house and grounds of the owner, though they are located near the edge of a city no great distance from smoke-producing factories. Crump v. Lambert, 3 Eq. Cases (Eng.) 408. An ordinance 'prohibiting the emission of dense smoke within the corporate limits of the city' has been held valid as a proper exercise of police power. City of St. Paul v. Naughbro, 93 Minn. 59, 100 N. W. 470, 66 L. R. A. 441, 106 Am. St. Rep. 427, 2 Ann. Cas. 580; City of Buffalo v. May Mfg. Co. (Sup.), 124 N. Y. Supp. 913; City of Rochester v. Macauley-Fien Milling Co., 199 N. Y. 207, 92 N. E. 641, 32 L. R. A. (N. S.) 554. * * *

"In the present case, it seems to be conceded that a brick kiln is an inviting place for tramps in cold weather. While relator expressed the conviction that he could keep them away, there is nothing to indicate they would not be turned loose on the residents of the neighborhood in the outskirts of the city, where police protection may be inadequate. Near valuable residences relator intends to build a smokestack 130 feet high, and to remove clay to a depth not disclosed by his plans or evidence. The value of residence property in the neighborhood might be damaged by relator's enterprise. These were proper matters for the consideration of the city lawmakers. When the entire record is considered, the evidence does not justify a finding that the ordinance in question has no relation to the public health, safety, or welfare, or that it is not a *bona fide* exercise of police power, or that it amounts to an unconstitutional invasion of relator's individual rights, or

that it is arbitrary and unreasonable. In this view of the law and the facts, he has not made a case entitling him to the writ. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings."

In *Barbier v. Connolly*, 113 U. S. 27, this court upheld the power of the city to enact an ordinance prohibiting the carrying on of washing and ironing in public laundries within a certain specified district without first having obtained a certificate from the health officer as to the sanitary condition of the premises and a certificate from the board of fire wardens as to the safe condition of the stoves and other apparatus; and prohibiting all washing or ironing in such district between the hours of ten in the evening and six in the following morning. The court held that the *municipal bodies are the exclusive judges of the necessity of such regulations*, and

"That the same municipal authority which directs the cessation of all labor may necessarily prescribe the limits within which it shall be enforced, as it does the limits in the city within which wooden buildings cannot be constructed. There is no invidious discrimination against anything within the prescribed limits by such regulations * * * there is none in the regulation under consideration. * * * It is not legislation discriminating against anything. All persons engaged in the same business within it are

treated alike; are subject to the same restrictions and are entitled to the same privileges under the same conditions."

Answering the contention that such legislation is contrary to the provisions of the fourteenth amendment to the federal constitution the court said:

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one man than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—

nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment."

The decision in *Barbier v. Connolly* was affirmed in *Soon Hing v. Crowley*, 113 U. S. 703, in which the same ordinance was under consid-

eration. In this case, however, an additional point appears to have been made, viz: that the ordinance was void on the ground that it discriminated between those engaged in the laundry business and those engaged in other classes of business, and that it discriminated between different classes of persons engaged in the laundry business. The court held that there was no force in this objection.

"The specific regulation for one kind of business which may be necessary for the protection of the public can never be a just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same kind of business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

III.

The Ordinance is Not Discriminatory.

Plaintiff in error contends:

First. That he is prohibited from manufacturing brick upon his property, while his competitors are permitted without regulation of any kind to manufacture brick upon property in all respects similar to that of plaintiff in error.

Second. That he is, by the ordinance in question, prohibited from conducting his business upon his own property, while said ordinance does not prohibit the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted.

Plaintiff in error has failed to perceive the true situation. As has been shown by defendant in error in his statement, not only is the business of brick manufacturing prohibited in the territory as described by the ordinance in question, but by ordinance No. 13,077, new series [Tr. p. 22], brick manufacturing and brick kilns are prohibited in another and much larger district, which district includes all the retail business section and a large section of the residence district of the city of Los Angeles. Also, by the terms of ordinance No. 22,798, new series [Tr. p. 22], all of the city of Los Angeles is declared to be a residence district, except such territory as is expressly set aside by ordinance as industrial districts and in which the business of brick manufacturing is permitted. And brick manufacturing, brickyards and brick kilns, as well as all businesses in the operation of which other than animal power is used, excepting five horse-power electric motors, are prohibited in the residence district.

There are many brickyards and brick manufacturing plants in the city of Los Angeles, but they are, in compliance with the ordinances of said city, located and operated in industrial districts.

That the ordinance in question does not prohibit or regulate the establishment of other industries or businesses in the district in question, is true, but they are prohibited and regulated by the other ordinances heretofore set out. The district here in question is a part of the declared residence district of the city of Los Angeles (ordinance No. 22, 798, new series), and is protected from the encroachment of factories and industries.

"The law is not rendered special by the mere fact that it does not cover every subject which the legislature might conceivably have included in it."

Ex parte Martin, 127 Cal. 57;

Ex parte Quong Wo, 161 Cal. 226.

IV.

The Ordinance is Not Unreasonable--Plaintiff in Error's Cases Distinguished.

The case of *Ex parte Throop*, 145 Pac. 1029, cited by plaintiff in error in his brief (p. 43) is easily distinguishable from the present case. Crushed rock, sand, and cement, the ingredients of concrete, are used for practically all construc-

tion work, including roadways, buildings, sidewalks, and sewer and storm drains. Portable rock crushers and concrete mixers are employed by contractors for the purpose of preparing and mixing the concrete upon the scene of their operations. Roadways and buildings must be built, the work is only temporary, and the rock crusher or cement mixer is soon moved to another job. The ordinance in question in that case would have made the use of concrete for construction work in the city almost impossible. No similarity can be shown between this case and the case here under consideration.

Moreover in the Throop case the record showed that the rock crusher of the petitioner was situated in a wash (the bed of a stream in which water only flows during the rainy season), three-fourths of a mile wide and consisting almost entirely of vacant and unimproved land, there being only four dwellings within a radius of two hundred yards from the crusher. The wash was cut off from the rest of the neighborhood by bluffs ranging in height from 50 to 100 feet and upwards. As the court said:

“In the dry season the floor of the Arroyo Seco presents the appearance of a desert waste, here and there dotted with cacti and brush.”

It is also noteworthy that prior to arriving at a decision in the Throop case the Chief Justice

of the Supreme Court, in company with counsel for the respective parties, had viewed the premises and the evidence of actual conditions as disclosed by such inspection, demonstrated to the court the utter unreasonableness of the ordinance therein questioned.

It also appeared that under the ordinances of the city of South Pasadena stone crushers were permitted to be maintained "in the heart of the city and fronted by residences and other buildings on all sides" and as the court said:

"While the ordinances permit the maintenance of a stone crusher in this restricted territory, surrounded by residences, the same ordinances make it a crime to erect or maintain one in a remote corner of the district No. 3 containing 2163 acres, a greater part of which is sparsely settled, or to maintain or erect one in the center of an area containing 500 acres in district No. 3 which is admittedly unimproved, undeveloped and practically uninhabited."

Under the particular circumstances of that case the court very properly held:

"In the case now under consideration it is plainly manifest that the attempted regulation of the business conducted by the petitioner has no relation to the ends for which the police power exists, namely, to protect the public health, comfort, safety, or welfare. An ordinance which prevents the operation of a stone crusher in a sparsely settled territory of 2,163 acres, 500 of which are undeveloped and practically un-

inhabited, and allows its operation in a small area of 11.65 acres in the center of a city surrounded by 'poorer classes of residences,' does not subserve the ends for which the police power exists."

As we have before pointed out the state Supreme Court, after going into the *facts* in the present case, has determined that the presumption in favor of the validity of an ordinance has not been rebutted by any showing that the plaintiff in error has been able to make, but, on the contrary, that the evidence before the court was sufficient to show the necessity of the enactment and the reasonableness thereof:

"The evidence thus before us when taken in connection with the presumptions in favor of the propriety of the legislative determination is certainly sufficient to overcome any contention that the prohibition was a mere arbitrary invasion of private right, not supported by any tenable belief that a continuance of the business in its present location was so detrimental to the interests of others as to require suppression."

Ex parte Hadacheck, 165 Cal. 416.

Two of the decisions which seem to be strongly relied upon by plaintiff in error, in which city ordinances prohibiting the conduct of a specified business within a particular district were held invalid are *Yick Wo v. Hopkins*, 118 U. S. 356, and *Dobbins v. City of Los Angeles*, 195 U. S. 223, but both of these cases are readily distin-

guishable from the present case. In each of them an investigation of the facts surrounding their enactment demonstrated to the satisfaction of the court that they were not passed in the proper exercise of the police power, but for the purpose of oppressing either certain members of a class or a particular individual. For example:

In the *Yick Wo* case an ordinance of the city and county of San Francisco had been enacted solely for the purpose of driving out of business in certain districts Chinese laundries, and the ordinance was declared invalid as a plain attempt to discriminate against subjects of the Chinese empire.

In the Dobbins case it appeared without question that the gas company petitioning the court had been unfairly treated by the councilmanic body in the passage of the ordinance which legislated the company's plant out of the locality in which it had been established. The manifest distinction between the Dobbins case and the *Yick Wo* case, and the case at bar, is, we firmly believe, sufficient to sustain the position of defendant in error and cause this Honorable Court to look with favor upon the ordinance here considered, which is designed solely to promote the public health and welfare.

The Dobbins case went up on demurrer to the

complaint, the allegations of which were therefore taken as true.

It was alleged in the complaint, and for the purpose of the demurrer was assumed to be the fact, that the plaintiff had purchased lands and made a contract for the erection of gas works upon territory which was not within the district within which the location of gas works was prohibited, and that after commencement of the work the council had passed a second ordinance including plaintiff's land within the prohibited territory, and that this second ordinance was adopted at the instigation of a rival company, and for the purpose of securing a monopoly, and that the territory which had been added to the prohibited district by the second ordinance was devoted almost exclusively to industrial purposes.

It was held that in that particular case the *allegations of the bill* disclosed such character of territory and such sudden and unexplained change of its limits after the plaintiff had purchased the property and proceeded to erect his works as to bring it within that class of cases wherein the court may restrain an arbitrary and discriminatory use of the police power which amounts to a taking of property without due process of law, and an impairment of property rights protected by the fourteenth amendment to the federal constitution, and the Federal Su-

preme Court held that the demurrer should have been overruled and the city put upon its answer.

All that this amounts to is a decision that where the complaint alleges an arbitrary and unfair use of the police power, exercised not for the purpose of protecting the public, but for the purpose of aiding one corporation at the expense of another, the city should be required to answer and deny, if it can do so, these allegations.

This decision certainly has no application in a case where the allegations of the petition have been denied under oath and affidavits setting forth the facts have been presented to the court and the highest tribunal in the state has passed upon the facts and has found that the ordinance in question was passed in the exercise of the legislative discretion and in conformity with the police power of the city, and with a view to the protection of the public welfare in order to promote the public health, safety and comfort, and not with the design or purpose to discriminate against the plaintiff in error or to injure him in his business or otherwise.

To further illustrate the distinction between the Dobbins case and the present case we quote from the opinion in the Dobbins case:

"It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will

not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case, but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court, in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts.

* * *

"In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment to the federal constitution."

Other cases in which regulatory ordinances prohibiting the carrying on of certain occupations within specified limits have been held invalid are cited by the plaintiff in error, but upon examination will be found not to be in point here. Some of these cases we shall briefly refer to for the purpose of pointing out the distinctions existing between them and the present case.

Varney and Green v. Williams, 155 Cal. 318. There the ordinance absolutely prohibited the maintenance of billboards anywhere within the corporate limits of the city. Manifestly a billboard, if properly constructed, is no more a menace to the public safety than is a fence; it is not a menace to the morals so long as improper advertisements are not displayed thereon. It cannot interfere with the enjoyment by others of their property, excepting so far as its presence may offend their aesthetic tastes. It does not produce noise, smoke, soot, dust or odors which physically invade the premises in the neighborhood, and the Supreme Court properly held that the city council cannot constitute itself the arbiter of the public on purely aesthetic questions.

Ex parte Bohem, 115 Cal. 372, there the ordinance in question was held invalid upon the ground that while burials of the dead are per-

mitted at all within a certain district the privilege cannot be limited to one class of citizens, and denied to another class within the same district. If the ordinance here in question prohibited the maintenance of brickyards by one class of persons, while permitting their maintenance by others within the same district, it would, of course, be discriminatory and invalid. The Bohemian case did not decide that an ordinance prohibiting the doing of a certain act within a specified district is necessarily invalid but merely that a right cannot be denied to one which is granted to others.

Mayor of Hudson v. Thorne, 7 Paige 261. What was said as to the last case applies to the Thorne case. The ordinance there in question prohibited certain persons from carrying on a business while others were permitted to carry on the same business in the same locality.

Tugman v. Chicago, 78 Ill. 405. In that case there was a discrimination between those owning and operating slaughter houses prior to a specified date, and those erecting and operating them after said date, and the ordinance was held invalid upon the ground that it made an act done by one person penal, while it imposed no penalty for the same act done under like circumstances by another person in the same locality.

We have examined the other cases cited by plaintiff in error and find none which cannot be as readily distinguishable from the present case as are those above referred to.

V.

Power to "Regulate" Includes Power to Restrict to Certain Districts and Prohibit in Others.

Plaintiff in error seeks to attack the ordinance upon the theory that under the provisions of its charter "The city may regulate but may not suppress or prohibit the maintenance of brick-yards." In support of this contention he cites the provisions of the city charter as they stood at the time the ordinance in question was adopted and as later amended. (Plaintiff in error's brief, page 75.) It is our contention that the power to regulate includes the power to restrict the carrying on of a business to a particular locality, and that, therefore, the charter provisions as they stood prior to the amendment of 1911 empowered the city council to pass the ordinance in question. The subsequent amendment of the charter giving the city the additional power to *suppress or prohibit* certain enumerated occupations, including brickyards, was intended to enable the city council not only to adopt ordinances to *regulate* the conduct of various businesses and occupations by restricting them to certain localities and excluding them

from others, in the exercise of its sound discretion and under its police powers, but to absolutely prohibit the carrying on of the enumerated occupations within *any* part of the city. Prior to the amendment of the charter the city had full power to regulate, including the power to restrict to a specified locality, and to exclude from other localities, but it did not have the power (except in the case of certain enumerated occupations) to suppress or prohibit altogether. By the amendment of 1911 brickyards were added to the list of occupations which the city was given the power to suppress or prohibit altogether. The very fact that the people of the city of Los Angeles by the amendment of 1911 added to the charter the power to altogether prohibit brickyards, thereby placing them in the same category with slaughter houses, dance halls, pool halls, etc., would indicate that the conducting of the business of brick-making had become such a nuisance within the city that it was thought necessary by the people to confer upon the city council the power to altogether prohibit it within the city limits.

Learned counsel for plaintiff in error devotes a large portion of his brief to the argument that the power to regulate, conferred by the charter as it stood at the time of the passage of the ordinance in question, was not sufficiently

broad to warrant it in passing an ordinance prohibiting the maintenance of brickyards within a specified district, but that it merely authorized the adoption of such ordinances as might provide rules pursuant to which such business might be conducted. Any dispute as to the scope of the power to "regulate," which might have at any time existed, would seem to have been fully answered by the Supreme Court of the state of California in its opinion in *Ex parte Quong Wo*, 161 Cal. 220, at page 230. The court there said:

"There is no question that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subservy the ends for which the police power exists, viz: to protect the public health, morals, safety and comfort."

The court said in the same opinion:

"That the power to regulate includes the power to confine certain occupations within prescribed limits in a city has been held in many cases, of which the following are examples: *Ex parte Byrd*, 84 Ala. 17 (5 Am. St. Rep. 328, 4 So. 397); *In re Wilson*, 32 Minn. 145 (19 N. W. 723); *Shea v. City of Muncie*, 148 Ind. 14 (46 N. E. 138); *Cronin v. People*, 82 N. Y. 318 (37 Am. Rep. 564); *City of Newton v. Joyce*, 166 Mass. 83 (44 N. E. 116); *State v. Beattie*, 16 Mo. App. 131; *Ex parte Lacey*, 108 Cal.

326 (49 Am. St. Rep. 93, 38 L. R. A. 640, 41 Pac. 411)."

In City of Little Rock v. Rineman, 155 S. W. 105, the Supreme Court of Arkansas held that by virtue of the power to "regulate" a city council may by ordinance prohibit the carrying on of a business within certain specified portions of a city.

In *In re Wilson*, 32 Minn. 148, 19 N. W. 724, the court said:

"Under a grant of police power to regulate, the right of municipal authority to determine where and within what limits a certain class of business may be conducted has been often sustained."

In City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, the Supreme Court of Missouri, passing upon the validity of an ordinance enacted by the city of St. Louis under a charter provision giving it the power to "license, tax and regulate" livery and sales stables, said:

"The first question for our consideration is whether or not the power to regulate livery and sales stables includes the right to designate places, and in what part of the city they may be located, and to prohibit their erection at other places."

The court answered this question as follows:

"We think that the city has the power under its charter and ordinances to regulate the place of building livery stables, and

confine them to certain localities within the corporate limits, as well as to regulate the manner of their keeping as to cleanliness, that they may not be or become obnoxious and deleterious to the health of her citizens."

- 2 Dillon on Municipal Corporations (5th Ed.), sec. 665;
- 3 McQuillin on Municipal Corporations, sec. 910.

VI.

No "Taking of Property" Without Due Process.

The taking of property without due process of law does not exist in the case of the regulation of industries for the purposes of public health, safety, morals, peace or welfare.

In *Mugler v. Kansas*, 123 U. S. 623, it is said:

"This contention the Supreme Court declares to be inadmissible. It says that the prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just cause be deemed a taking or an appropriation of property for the public benefit; that the power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the people, is not, and consistently with the existence and safety of organized society, cannot be burdened with the condition that the

state must compensate such individual owners for the pecuniary losses they may sustain by reason of their not being permitted by a noxious use of their property to inflict injury upon the community; that the state by allowing the manufacture of liquors when the breweries were purchased or erected did not give any assurance or come under any obligation that its legislation upon the subject would remain unchanged."

See also:

Western Indemnity Co. v. Pillsbury, 50
Cal. Dec. 294;
Mo. Pac. R. R. v. Omaha, 235 U. S. 121.

In Campbell v. Seaman, 63 N. Y. 563, the court said:

"We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brickmaking. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly settled community."

VII.

**It is Not Necessary that a Business be a Nuisance
Per Se to be Regulated.**

"Conceding the business covered by the provisions of this ordinance not to constitute a nuisance *per se*, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance *per se*, and the power to regulate is in no way dependent upon such conditions. * * * And in this class of cases it is no defense to the validity of regulation ordinances to say: 'I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact.'"

Ex parte Lacey, 108 Cal. 326, 328.

"The decisions of this court show that ordinances have been upheld in many cases prohibiting things which could not be said to be nuisances *per se*, and which had not been declared to be such by any court. * * * Whenever a thing or act is of such a nature that it becomes a nuisance, or may be injurious to the public health if not suppressed or regulated, the legislative body may in the exercise of its police powers make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past."

Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 226, 231.

We respectfully call this Honorable Court's attention to the fact that many of the cases cited by plaintiff in error and upon which he relies most strongly, are civil cases for damages, or cases involving the granting or denial of injunctions.

The case of *Phillips v. Lawrence Vitrified Brick and Tile Company*, 72 Kans. 643, cited by plaintiff in error in his brief (p. 62), is an action for damages resulting to property owners by reason of the operation of a brick kiln. In that case the court found the injury to plaintiff to be so slight as to prevent an award of damages.

In the case at bar the city council of Los Angeles, acting in accordance with the desires of the citizens, have endeavored to beautify said city, as well as to regulate its industrial and residential growth, with a view to convenience and system.

Plaintiff in error has operated, and is operating, his business in defiance of the ordinance in question, and now wishes the ordinance declared void, by reason of the fact, as he sets it forth, that his business is not a nuisance *per se*, but a useful and necessary occupation. It is a necessary and useful occupation, and would undoubtedly be a credit to the city of Los Angeles if maintained and operated in its proper place.

Conclusion.

In conclusion we urge this Honorable Court to consider the difficulties encountered by all cities in the regulation of business enterprises—what obstacles the legislative bodies of municipalities meet with in their endeavor to serve the whole public and to avoid all appearance of individual favoritism. Their acts are praised or condemned as they affect individuals and associations, and many there are who are quick to attribute dishonest motives to legislators when their own interests are affected adversely, even though society at large be benefited. Society demands that the individuals who compose it give somewhat of their worldly goods when the need arises. It is one of the penalties placed upon man by which he pays for his existence in a well-organized and intelligent community.

To hold this ordinance void would be, in effect, to make it impossible for municipalities to lay out orderly cities. A city is a thing of beauty, or an eyesore, accordingly as its streets and districts are arranged. The tendency to segregate residence sections, retail business sections, civic sections, and industrial sections, is no new thing, in fact, it has always been a natural action in all civilized countries, whether the law so required, or the result of individual inclination. When not regulated by legislation,

factories and industrial enterprises have crept into fine residence property to its ruination. Now the public is alive to the situation, and a world-wide endeavor is being made to set aside in cities districts for certain classes of activities, that persons and communities in other walks of life may not be disturbed thereby.

It is and always has been the policy of the city of Los Angeles to give every possible advantage to persons and associations engaged in commercial and industrial enterprises, in order that the city may grow in prosperity and become as famed for its manufactures and industrial wealth as for its beauty and unsurpassed climate. But with this policy always in mind, the city honestly believes that it is not going too far in ordaining that brickyards, brick kilns and brick manufacturing plants be operated in districts expressly set aside for their activities, and we respectfully ask this Honorable Court to so hold.

Respectfully submitted,

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WARREN L. WILLIAMS,

City Prosecutor,

Of Counsel.

NOV. 19
JAMES A. M.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term 1915.

No. 32.

J. C. Haderbach,

Plaintiff in Error,

vs.

*O. E. Sebastian, Chief of Police of
the City of Los Angeles,*

Defendant in Error.

*Supplemental and Reply Brief on Behalf of
Plaintiff in Error.*

EMMET H. WILSON,

Attorney for Plaintiff in Error.

G. C. Di CARMO,

Of Counsel.

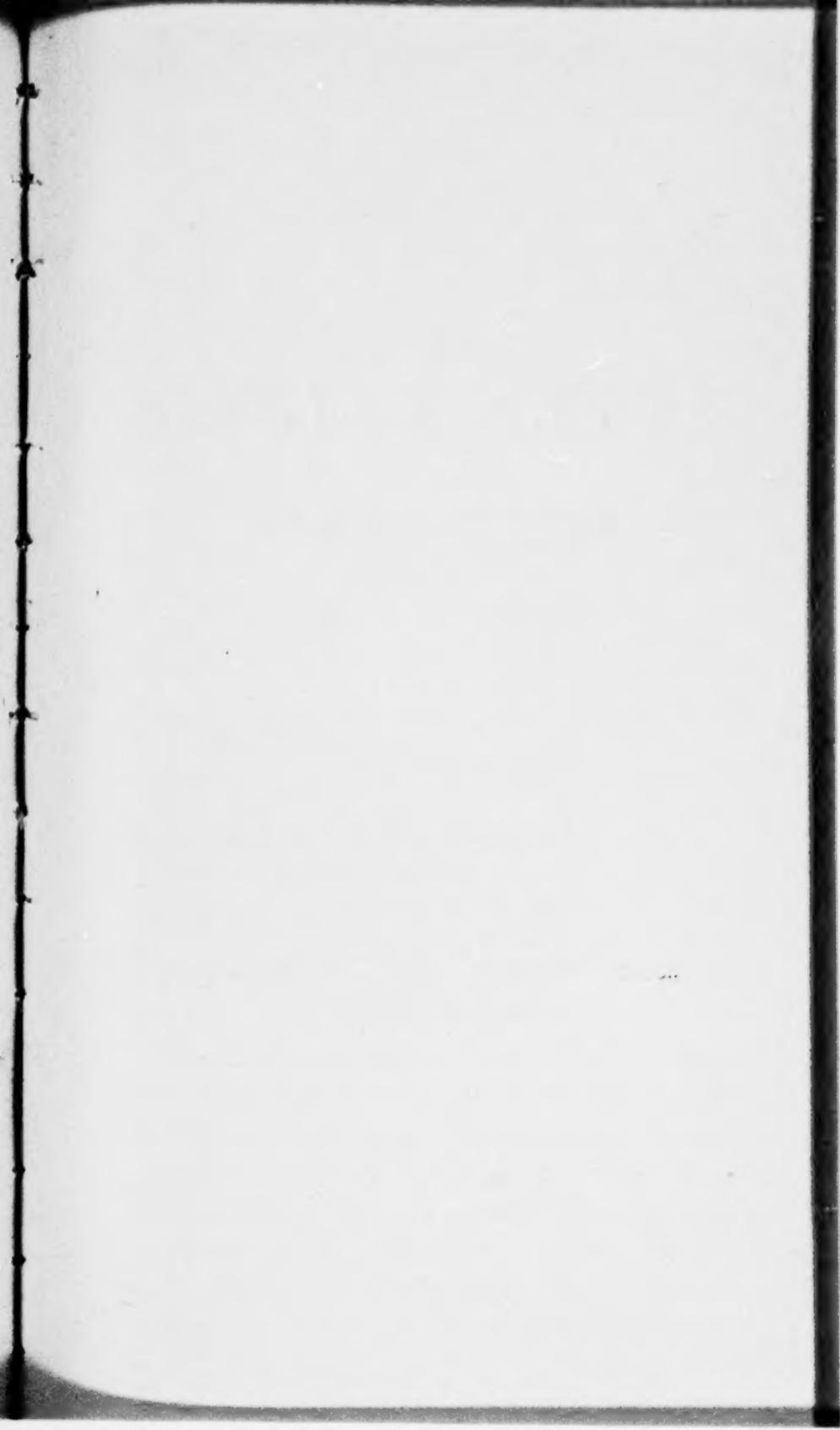
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IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term 1915.

No. 32.

J. C. Hadacheck,

Plaintiff in Error,

vs.

**C. E. Sebastian, Chief of Police of
the City of Los Angeles,**

Defendant in Error.

**Supplemental and Reply Brief on Behalf of
Plaintiff in Error.**

This case by stipulation was submitted upon the briefs without oral argument, and by the same stipulation counsel agreed that we might submit a reply. We shall touch briefly upon some of the statements contained in the printed argument of the defendant in error, and we shall note at the proper place one or two instances in which counsel, unintentionally no

doubt, have extended their argument outside of the record and have relied upon statements of fact that do not appear in the transcript.

Discrimination.

In counsel's reference to our argument upon the question of discrimination between the plaintiff in error and the owners of other brick-making establishments that have not been regulated in any manner they state that "*if* said portions of the city have been made industrial districts, in which the carrying on of such an occupation is allowed," it is of no importance that people may choose to continue to reside near the other brickyards. It does not appear in the record here that any of the brickyards in question are located within the so-called "industrial districts," but on the contrary it does appear affirmatively that plaintiff in error's competitors are maintaining their brickyards surrounded by residences and closely adjacent to an orphans' home, an old people's home, a public park and a county hospital. [Tr. pp. 9 and 10.] It also appears that the portion of the city in which these brickyards are situated "is improved and is being more rapidly and more greatly improved with homes and other improvements" [Tr. p. 10], and that the city council has refused to regulate the said brickyards in any manner, notwithstanding a large petition from the adja-

cent residents to have them suppressed. [Tr. p. 10.]

Every regulation, under the police power, of a lawful business must be uniform as to and must apply alike to all of the same class.

City of Vicksburg v. Mullane (Miss., Dec. 1, 1913), 63 So. 412.

On page 48 counsel state that we have failed to perceive the true situation, and then proceed to argue that by the terms of another ordinance all of the city of Los Angeles is declared to be a residence district, except such territory as is expressly set aside by ordinance as industrial districts, and that all brickyards and all other businesses operated by other than animal power, excepting five-horsepower electric motors, are prohibited in all portions of the city except in the industrial districts. We have already pointed out that the record does not show that the other brickyards mentioned in the record are within the industrial districts, and for that reason we still maintain that there is an attempted discrimination between the plaintiff in error and the other manufacturers of brick.

We also maintain that there is a discrimination between the plaintiff in error and the owners of other businesses within the district described in the ordinance in question, in that the business

of manufacturing brick is the only business prohibited in the said district.

Counsel for the defendant in error have constantly referred to the so-called "residence district ordinance" by which the operation of any business requiring the use of mechanical power except five-horsepower electric motors is prohibited within the district described therein. They lose sight of the fact, however, that many nuisances far worse than a brickyard could possibly be, even with the most negligent management, do not need power of any kind in their operation. It does not require mechanical power to boil soap or glue, and many other businesses of like nature might be enumerated that are carried on without the use of mechanical power, and many that require the use of machinery are operated with an electric motor of five horsepower or less.

Counsel have attempted to distinguish the case of *Dobbins v. Los Angeles*, 195 U. S. 223, from the case at bar, and state that it appeared in the *Dobbins* case the plaintiff in error had been unfairly treated by the city council. If the cases are different it is in degree only. In each case the ordinance finally affected only one—the one sought to be removed. As to unfair treatment, was the plaintiff in error here treated fairly when the city council rejected the mayor's suggestion that the ordinance be made effective at

a future date, thus giving the plaintiff in error a reasonable length of time within which to close up his business? [Tr. p. 6.] Was he treated fairly by the council when it passed the ordinance, without a saving clause, over the mayor's veto, so that under the terms of the city charter the ordinance became effective thirty days after its passage? [Tr. p. 6.]

Was the city council entirely fair to all parties when, after having adopted the ordinance in question in April, it refused in October of the same year to suppress or even to regulate any of the brickyards belonging to competitors of the plaintiff in error, although petitioned so to do by several hundred persons residing near and affected by the said brickyards? [Tr. p. 10.] Do not the facts in this case show, as in the *Dobbins case*, that only one person was the object of the wrath of the city council—in this case the plaintiff in error? Why the solicitude concerning the residents of one section of the city if relief was to be denied those of another section?

Counsel for defendant in error say on page 58:

"If the ordinance here in question prohibited the maintenance of brickyards by one class of persons, while permitting their maintenance by others within the same district, it would, of course, be discriminatory and invalid."

It is unnecessary for us to repeat here any of our argument upon the question of discrimination. Counsel for the defendant in error, in their statement above quoted, have recognized the correctness of our position, to-wit, that the ordinance must apply to all businesses alike. It is inapt, however, to narrow their statement to brickyards. Counsel's statement would be entirely correct if they said that inasmuch as the ordinance prohibits the maintenance of brickyards, while permitting the maintenance of other businesses of like or worse nature within the same district, it is, of course, discriminatory and invalid.

Necessity for Present Location.

Considerable weight is given in the argument of the defendant in error to certain allegations appearing in the return to the writ of *habeas corpus*, to the effect that the business of making, burning and selling brick is permitted to be conducted in approximately one-third of the area of the city of Los Angeles, and that in the said portion of the city there are situated large beds of clay suitable to be utilized for the purpose of brick-making. In this connection it must be remembered that, because of the exceptionally fine clay thereon, the plaintiff in error purchased his property in March, 1902 [Tr. p. 2], at a time when the said property was outside of the

corporate limits of the city of Los Angeles and distant from any dwellings or other habitations [Tr. p. 3], and for the reason that the plaintiff in error, in common with owners of adjacent property, did not expect or believe that the said territory would ever be annexed to the city of Los Angeles. [Tr. p. 3.] The said territory was not annexed to the city of Los Angeles until October, 1909. [Tr. p. 4.]

The plaintiff in error is in the position of having purchased land essentially desirable for his chosen occupation in a location where he would neither molest nor be molested, and now upon the annexation of the territory to the city the defendant in error says to him that he must abandon his valuable property and go into the industrial section of the city and there purchase clay beds, if any there be, at an exorbitant price in order that he may continue his business. [See Tr. pp. 22, 24, and Defendant in Error's Brief p. 5.] To the defendant in error it seems of little moment that valuable property is rendered worthless and useless. This is an example of oppression seldom found even in the most unrestrained exercise of the police power by municipalities.

On page 66 counsel for the defendant in error admit that the plaintiff in error is carrying on "a necessary and useful occupation" and one that "would undoubtedly be a credit to the city of

Los Angeles if maintained and operated in its proper place," but nowhere in their brief do they advance any solution, nor can any be suggested, for the problem involved here, to-wit, that if the ordinance is upheld and enforced, how can the plaintiff in error utilize his clay and how can he avoid the entire loss of his property, owing to his inability to manufacture brick at any place other than the source of clay supply?

Where, indeed, is the "proper place" for this brickyard referred to by counsel? Where can marble or granite be obtained but at the quarry? Where can gold be mined but from the ledge in which it is found? Can an oil well be operated at any place other than that at which the oil sand is located? So with the brickyard. The clay bed cannot be removed to a distant location, but must be utilized where nature placed it. No matter how valuable the clay if removed and made into bricks, or how valueless if not removed, the plaintiff in error must allow it to remain in place and suffer the entire loss of his property if this ordinance is held to be valid.

In our opening brief we quoted from the opinion in the case of *In re Kelso*, 147 Cal. 609, in which an ordinance prohibiting the maintenance of a stone quarry in a certain portion of San Francisco was held to be void. For the

reason that it is so clearly and so closely in point we again quote briefly from the same opinion:

"The effect of the ordinance * * * is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership. * * * The next thing to depriving a man of his property is to circumscribe him in its use. A limitation of the use *pro tanto* deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law. * * * We are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of such removal. * * * We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be done."

Beginning on page 31 counsel for the defendant in error cite a number of cases sustaining ordinances that divide cities into districts and prohibit the maintenance of certain businesses within such districts. All of the cases cited by them upon this point relate to occupations that may be carried on as well at one place as at another. Without analyzing the cases we merely

refer to the same and to the subject-matter thereof:

Ex parte Quong Wo, 161 Cal. 220 (laundry);

In re Montgomery, 163 Cal. 457 (lumber yard);

Ex parte Lacey, 108 Cal. 326 (carpet beating establishment);

City of New Orleans v. Murat, 119 La. 1093 (dairy);

City of Little Rock v. Rineman (Ark.), 155 S. W. 105 (livery stable);

City of St. Louis v. Russell, 116 Mo. 248 (livery stable);

Ex parte Botts, 154 S. W. 221 (keeping of hogs);

Barbier v. Connolly, 113 U. S. 27 (laundry regulations);

Soon Hing v. Crowley, 113 U. S. 703 (laundry).

None of these occupations depend for their existence upon the character of the ground upon which they are conducted.

The only case cited by counsel for the defendant in error that can be considered even remotely akin to the case at bar is that of *State ex rel. Krittenbrink v. Withnell* (Neb.), 135 N. W. 376. That case, however, differs from the case at bar in several respects:

1. The ordinance in the case last cited did not prohibit the city, but prohibited the erection or construction *within the city* of any kiln or oven to be used in the manufacture of brick.
2. The relator in that case had not constructed his kiln, or commenced operations, or established his business, and brought the action to restrain the enforcement of the ordinance in order that he might proceed to erect his kiln for the manufacture of brick.

3. The ordinance prohibited the *erection or construction* of any kiln or oven to be used in the manufacture of brick, but so far as the opinion shows the ordinance did not apply to or prohibit the maintenance of brickyards already in existence.

The case last cited is the only one mentioned by counsel for the defendant in error that involved the construction or maintenance of any plant which depended for its existence upon the product of the earth at the place where the plant was maintained, and for the reasons stated that case is not in point here.

Counsel for the defendant in error have not cited a single case like the case at bar in which the ordinance involved was sustained.

On the other hand a number of cases cited in our opening brief sustain our position and are

directly at variance with the argument of counsel for the defendant in error.

In re Kelso, 147 Cal. 609;
Barnard v. Sherley, 135 Ind. 547;
Phillips v. Lawrence Vitrified Brick & Tile Co., 72 Kans. 643, 2 L. R. A. (N. S.) 92;
Denver v. Rogers, 46 Colo. 479, 104 Pac. 1042;
Belmont v. New England Brick Co., 190 Mass. 442;
Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126;
Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 62 Am. St. Rep. 532, 37 L. R. A. 381;
Huckenstine's Appeal, 70 Pa. St. 102;
State v. Board of Health, 16 Mo. App. 8.

We submit that the enforcement of the ordinance in question would amount to a taking of plaintiff in error's property without compensation, and would be virtually a confiscation of his property, and therefore that the ordinance is and should be held invalid.

The City's Power to Regulate.

Aside from our contention in our former brief herein (pp. 74 *et seq.*) that the city under its charter had power to regulate, but *not* to pro-

hibit, the operation of the brickyard in question, we maintain as a general proposition that the power *to regulate* does not include the power to enforce an *absolute prohibition* against a legitimate business that may be pursued as of common right.

The police power of the state has limitations both inherent and fundamental. A restraint imposed by the legislature upon the use and enjoyment of property within reasonable bounds is a regulation and not a taking—an exercise of the police power, and not of eminent domain. But the moment the legislature passes beyond mere regulation and attempts to deprive the individual of his property or of some substantial interest therein under the guise or pretense of regulation then the act becomes one of eminent domain. The record shows in this case that the property of the plaintiff in error is worth approximately \$800,000.00 for brick-making purposes and not to exceed \$60,000.00 for any other purpose. [Tr. p. 3.] The enforcement of the ordinance in question amounts to a taking without compensation and to confiscation of the property of the plaintiff in error.

On page 25 of the defendant in error's brief appears this statement: "The city has the right to regulate an occupation by confining the conducting thereof within prescribed limits," citing a number of cases. We venture the assertion,

however, that in none of the cases cited was the authority of the city circumscribed as in the case at bar. Without repeating, we refer to our opening brief (pp. 56-99) upon the question that the city not only had no power to pass the ordinance in question, but was *restrained by the provisions of the charter* itself from passing the same. This question is further elaborated from the defendant in error's viewpoint on pages 59-63 of his brief, but the entire argument is based upon the *general definition* of the power to regulate.

All that counsel say might be true in most cases, but where a limited, defined or peculiar meaning has been given to a word, either by express terms of the statute or by implication from other portions of the statute, that meaning must be followed by the courts. In other words, *if the city is given power to regulate one occupation and to prohibit another, the courts cannot say that by that provision the city is given power to prohibit both occupations.* Neither can it be said that the power to regulate in such a case would empower the city by the use of terms apparently of regulation actually to suppress or to prohibit the occupation over which it was given power only to regulate.

The power granted in the city charter "to regulate" does not include the power "to prohibit" and the power of the city cannot be extended beyond the matters enumerated in the

charter. (See cases cited on pages 78-81 of our former brief.)

The police power resides in the legislature and may be exercised by local bodies only to the extent that it has been plainly designated.

People v. Western N. Y. & P. T. Co., 214
N. Y. 526.

We do not contest the proposition that the city, both under its charter and under the general police power, was authorized to regulate the business of brick-making, and we still maintain, notwithstanding anything to the contrary appearing in the brief of the defendant in error, that every complaint, other than esthetic, regarding the brickyard in question can be effectually and efficiently disposed of by measures less harsh than the enforcement of the ordinance in question.

Judson v. Los Angeles Suburban Gas Co.,
157 Cal. 168, 26 L. R. A. (N. S.) 183.

In the case last cited the defendant was not enjoined from maintaining or operating its gas plant and was not deprived of its property or of the use thereof, but was enjoined "from conducting and operating the gas works and manufactory * * * in such a *manner* as to cause or permit smoke, gases or offensive smells or fumes to be emitted therefrom or to be precipitated therefrom upon the property of the plain-

tiff." The defendant was not prohibited from carrying on its business, but was required so to conduct the same that no nuisance was created.

We submit that by the adoption and the enforcement of proper ordinances any manufacturer of brick may be prohibited from creating a nuisance by reason of noise, smoke or gas that may be generated in or emitted from his brickyard. We have invited such regulation and have offered and agreed to co-operate therein, provided the same regulations apply to all alike. If this is done all the requirements of the police power will have been satisfied.

The only reason then to be advanced for the enforcement of the ordinance in question would be esthetic—a reason held to be insufficient to warrant the exercise of the police power, particularly in restricting the owner of property from using the same in an ordinary manner.

Varney & Green v. Williams, 155 Cal.
318.

In the case of *Dibrell v. City of Coleman* (Tex. Civ. App., decided November 18, 1914, rehearing denied January 6, 1915), 172 S. W. 550, the municipality was authorized by its charter "to abate and remove nuisances, * * * to define and declare what shall be nuisances, * * * and direct the summary abatement thereof." The court held that the power to de-

fine a nuisance did not empower a city to make that a nuisance which was not such *per se* and did not become such by reason of the surrounding circumstances or the manner in which it was done.

On page 6 of the brief of defendant in error it is stated that "no complaint was ever made or issued, nor could any complaint have been issued by reason of the operation of said brickyard until after the territory in which it was situated became a part of the city of Los Angeles and an ordinance had been adopted making the conducting of a brickyard in said district a misdemeanor." In making this statement counsel overlook the fact that complaints might have been issued and prosecutions might have been had while the territory was under a jurisdiction other than that of the city of Los Angeles, and they also overlook the fact that if there had been any tangible reason, prior to annexation to the city, for suppressing the brickyard in question or prohibiting any nuisance created thereby, the courts were at all times open for the granting of injunctive relief, and the county possessed legislative power to regulate.

Reference is made by counsel to the return of the chief of police to the writ of *habeas corpus* and to certain affidavits attached to the return, in which allegations are made relative to the manner in which the brickyard was conducted.

Objections made by the defendant in error and by those who signed the affidavits attached to the return could have been remedied to a better advantage to the adjacent property owners, as well as without destroying the valuable property of the plaintiff in error, by the regulatory rather than by the prohibitory process.

As to Other Ordinances.

On page 11 of the brief of the defendant in error counsel refer to certain ordinances that are mentioned in the return. The defendant in error in making his return to the writ of *habeas corpus* saw fit to make reference to the ordinances mentioned, but did not set them forth to such an extent that this court may determine the effect thereof. Reference was made to another ordinance of the city of Los Angeles prohibiting the maintenance of brickyards, and the defendant in error stated in his return that the district described in the said ordinance was "considerably larger in territory than the district" described in the ordinance in question in this case. [Tr. p. 22. See also Defendant in Error's Brief p. 48.] Inasmuch as the district in question here contains less than three square miles out of the total area of the city, 107.62 square miles [Tr. p. 8], the statement that the other district is "considerably larger" is not an illuminating comparison. The fact is that the district described

in the other ordinance embraced only a small portion of the city.

Reference is also made to the so-called "residence district ordinance," which prohibits within residence districts "all businesses having mechanical power except five-horsepower motors." Counsel argue from this that the business of the plaintiff in error is necessarily prohibited by the "residence district ordinance." Counsel, however, do not point to any portion of the record showing, and in fact it nowhere appears, that the plaintiff in error ever made use of mechanical power of any kind; and if it be assumed that brick cannot be manufactured with the use of animal power alone, and that mechanical power must be used, yet it nowhere appears that the power used by him is of a character prohibited by the said "residence district ordinance" or that any motor used by him exceeds the limit permitted by the said ordinance.

We might reasonably inquire, if the same matter were already covered by the "residence district ordinance," why it was deemed necessary to adopt and to attempt the enforcement of the ordinance in question here. If the plaintiff in error had been using mechanical power and had been operating motors in excess of five horsepower, it is not unreasonable to assume that the city would have enforced that ordinance against him and would not have adopted an entirely sep-

arate and unnecessary ordinance, and one that would apply only to the plaintiff in error and to one other small brickyard. This, however, only emphasizes the fact that the ordinance in question not only discriminates, but was intended to discriminate against the plaintiff in error.

We maintain that the ordinance in question is in violation of the Constitution and that the decision of the Supreme Court of the state of California should be reversed.

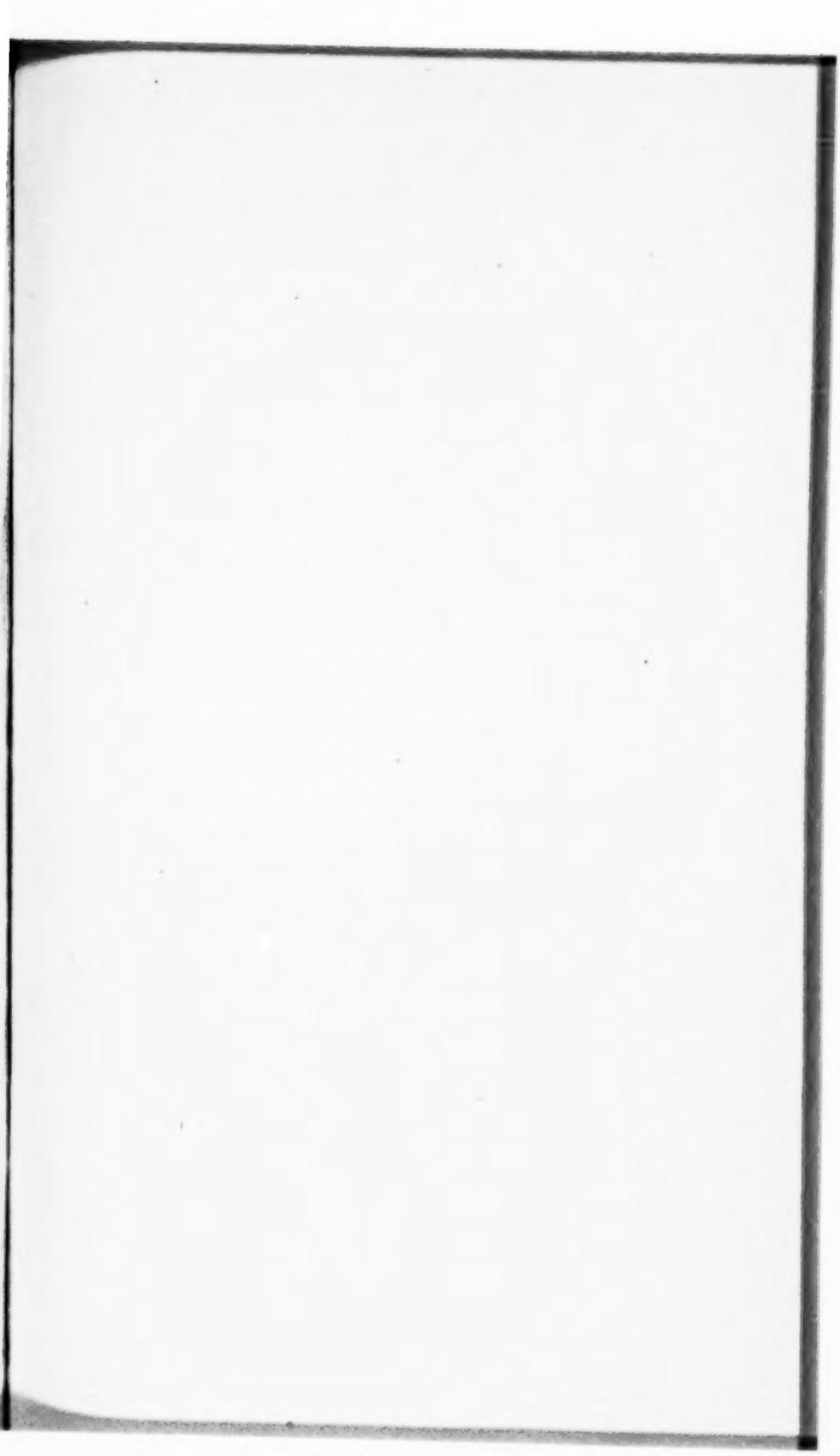
Respectfully submitted,

EMMET H. WILSON,

Attorney for Plaintiff in Error.

G. C. DE GARMO,

Of Counsel. R



HADACHECK *v.* SEBASTIAN, CHIEF OF POLICE
OF THE CITY OF LOS ANGELES.

ERROR TO THE SUPREME COURT OF THE STATE OF
CALIFORNIA.

No. 32. Submitted October 22, 1915.—Decided December 20, 1915.

While the police power of the State cannot be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them equal protection of the law, it is one of the most essential powers of Government and one of the least limitable—in fact, the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised.

A vested interest cannot because of conditions once obtaining be asserted against the proper exercise of the police power—to so hold would preclude development. *Chicago & Alton R. R. v. Trambarger*, 238 U. S. 67.

There must be progress, and in its march private interests must yield to the good of the community.

The police power may be exerted under some conditions to declare that under particular circumstances and in particular localities specified businesses which are not nuisances *per se* (such as livery stables, as in *Reinman v. Little Rock*, 237 U. S. 171, and brick yards, as in this case) are to be deemed nuisances in fact and law.

While an ordinance prohibiting the manufacturing of bricks within a specified section of a municipality may be a constitutional exercise of the police power—*quare* whether prohibiting of digging the clay and moving it from that section would not amount to an unconstitutional deprivation of property without due process of law.

This court cannot consider the contention of one attacking a municipal ordinance that it denies him equal protection of the laws when based upon disputable considerations of classification and on a comparison

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Argument for Plaintiff in Error.

of conditions of which there is no means of judicial determination.

In this case, the charges of plaintiff in error that the ordinance attacked and alleged to be ruining his business was adopted in order to foster a monopoly and suppress his competition with others in the same business, is too illusive for this court to consider, the state courts having also refuted it.

The fact that a particular business is not prohibited in all sections of a municipality, does not for that reason, make the ordinance unconstitutional as denying equal protection of the law to those carrying on that business in the prohibited section—conditions may justify the distinction and classification.

In determining whether a municipal ordinance goes further than necessary to remedy the evil to be cured, this court must, in the absence of clear showing to the contrary, accord good faith to the municipality.

Whether an ordinance is within the charter power of the city or valid under the state constitution are questions of state law.

An ordinance of Los Angeles prohibiting the manufacturing of bricks within specified limits of the city, held, in an action brought by the owner of brick clay deposits and a brick factory, not to be unconstitutional as depriving him of his property without due process of law, or as denying him equal protection of the laws.

165 California, 416, affirmed.

THE facts, which involve the constitutionality under the due process and equal protection provisions of the Fourteenth Amendment of an ordinance of Los Angeles prohibiting brick yards within certain limits of the city, are stated in the opinion.

Mr. Emmett H. Wilson and *Mr. G. C. DeGarmo* for plaintiff in error:

Although an ordinance is purported to have been enacted to protect the public health, morals or safety if it has no substantial relation to those objects, constitutional rights have been invaded and it is the duty of the court so to adjudge. *Yick Wo v. Hopkins*, 118 U. S. 356; *Lochner v. New York*, 198 U. S. 45; *Lawton v. Steele*, 152 U. S. 133.

The State, or any political subdivision thereof, when

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legislating for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of Federal Constitution of the United States, and is not permitted to violate rights secured or guaranteed thereby. *Henderson v. Wickham*, 92 U. S. 259; *Hannibal Co. v. Husen*, 95 U. S. 465; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Walling v. Michigan*, 116 U. S. 446; *Yick Wo v. Hopkins*, 118 U. S. 356.

The business of operating brick yards and manufacturing brick is a useful, necessary and lawful occupation and is not a nuisance *per se*. *Huckenstine's Appeal*, 70 Pa. St. 102; *State v. Board of Health*, 16 Mo. App. 8; *Phillips v. Lawrence V. B. & T. Co.*, 72 Kansas, 643; *Denver v. Rogers*, 46 Colorado, 479; *Windfall Mfg. Co. v. Patterson*, 148 Indiana, 414; *Belmont v. New England Brick Co.*, 190 Massachusetts, 442.

A city cannot prohibit the maintenance of a brick yard unless, by reason of the manner of its operation, it becomes a nuisance in fact. *Yates v. Milwaukee*, 10 Wall. 497; *Everett v. Council Bluffs*, 46 Iowa, 66; *Ex parte Sing Lee*, 96 California, 354; *In re Sam Kee*, 31 Fed. Rep. 680; *In re Hong Wah*, 82 Fed. Rep. 623; *Ex parte Whitwell*, 98 California, 73; *Stockton Laundry Case*, 26 Fed. Rep. 611; *Denver v. Rogers*, 46 Colorado, 479; *Denver v. Mullin*, 7 Colorado, 345; *Phillips v. Denver*, 19 Colorado, 179, 184.

A city council is not empowered to pass an ordinance making that a nuisance which is not a nuisance *per se*. The legislative declaration cannot alter the character of a business so as to make a nuisance of that which is not such in fact. Nor will the mere legislative declaration of the existence of a nuisance be accepted as a fact by the courts. Cases *supra* and *Los Angeles v. Hollywood Cemetery*, 124 California, 344; *Grossman v. Oakland*, 30 Oregon, 478.

The power possessed by the city to abate nuisances does

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not include power to prevent unless the business is a nuisance *per se*. *Lake View v. Letz*, 44 Illinois, 81; *In re Smith*, 143 California, 371; *Hume v. Laurel Hill Cemetery*, 142 Fed. Rep. 552, 563; *Laurel Hill Cemetery v. City*, 152 California, 464, 472; Freund, Police Power, §§ 63, 144; Dillon, Mun. Corp. (5th ed.), § 666; *In re Kelso*, 147 California, 611; *Covington & L. P. R. Co. v. Sandford*, 164 U. S. 578, 592; *Ruhstrat v. People*, 185 Illinois, 133.

In cases of this kind the court must scrutinize the objects and purposes sought to be accomplished by the ordinance in question for the purpose of determining its validity. In so doing they are not limited to matters that appear upon the face of the ordinance, but may consider all the circumstances in the light of existing conditions. Cases *supra* and *Lake View v. Tate*, 130 Illinois, 247; *Ex parte Patterson*, 42 Tex. Crim. Rep. 256; *People v. Armstrong*, 73 Michigan, 288; *Oxanna v. Allen*, 90 Alabama, 468; *Tugman v. Chicago*, 78 Illinois, 405; *Cleveland Co. v. Connorsville*, 147 Indiana, 277; *State v. Boardman*, 93 Maine, 73; *Kosciusko v. Slomberg*, 68 Mississippi, 469; *Crowley v. West*, 52 La. Ann. 526; *Odd Fellows' Cemetery v. San Francisco*, 140 California, 226; *Pieri v. Mayor*, 42 Mississippi, 493; *Corregan v. Gage*, 68 Missouri, 541; *Chicago v. Rumpf*, 45 Illinois, 90.

The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or the suppression of a lawful business, cases *supra*, nor can discriminatory legislation be sustained even though enacted under color of sanitary power. Freund, Police Power, § 138.

A law is not general or constitutional if it imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a person selected from the general body of those who stand in precisely the same relation to the subject of the law. *Pasadena v. Stimson*, 91 California, 238; *Bruch v. Colombet*, 104 California, 347; *Darcy v. Mayor*, 104 California, 642; *People v. Cent. Pac.*

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R. R., 105 California, 576, 584; *Cullen v. Glendora Water Co.*, 113 California, 503; *Ex parte Clancy*, 90 California, 553; *Krause v. Durbrow*, 127 California, 681.

The imposition of dissimilar regulations upon different persons engaged in the same business must be founded upon differences that will rationally justify the diversity of legislation. *Ex parte Jentzsch*, 112 California, 474; *Darcy v. Mayor*, 104 California, 642; *Ex parte Bowen*, 115 California, 372; *Ex parte Dickey*, 144 California, 237; *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126; *Phillips v. Denver*, 19 Colorado, 179; *Belmont v. New England Brick Co.*, 190 Massachusetts, 442; *Commonwealth v. Mahalsky*, 203 Massachusetts, 241; *Chicago v. Netcher*, 183 Illinois, 104; *Braceville Coal Co. v. People*, 147 Illinois, 66.

The ordinance in question deprives the plaintiff in error of his property without due process of law and is therefore void. *Frorer v. People*, 141 Illinois, 171; *Ramsey v. People*, 142 Illinois, 380; *C., B. & Q. R. R. v. Chicago*, 166 U. S. 224; *Chicago v. Netcher*, 183 Illinois, 104; *Braceville Coal Co. v. People*, 147 Illinois, 66.

In order to sustain the validity of a municipal ordinance it is necessary for the court to determine that its provisions are reasonable. *Chicago v. Rumpf*, 45 Illinois, 90; *Toledo W. & W. Ry. v. Jacksonville*, 67 Illinois, 37; *Tugman v. Chicago*, 78 Illinois, 405; *Lake View v. Tate*, 130 Illinois, 247; *Oxanna v. Allen*, 90 Alabama, 468.

The ordinance is unreasonable because the severe measures adopted were not reasonably necessary for the prevention of the acts complained of in reference to the brickyard. Remedies other than confiscation of the property would have been effective. Cases *supra* and *Judson v. Los Angeles Suburban Gas Co.*, 157 California, 168.

The ordinance is unreasonable because if any nuisance has existed the same may be abated by regulatory rather

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than by suppressive and confiscatory measures. The business should be allowed to continue upon eliminating such features, if any, as constituted a nuisance. Cases *supra* and *Green v. Lake*, 54 Mississippi, 540; *Chamberlain v. Douglas*, 48 N. Y. Supp. 710; *Pach v. Geoffrey*, 22 N. Y. Supp. 275; *Yocum v. Hotel St. George*, 18 Abb. N. C. (N. Y.) 340; *Miller v. Webster*, 94 Iowa, 162.

The ordinance is unreasonable because it is not limited with reference to conditions and measures. The danger may be slight and remote while the remedy—entire suppression—could not be more drastic. Cases *supra* and *Freund, Police Power*, § 143.

The ordinance is unreasonable because the means adopted are out of proportion to the danger involved. The restraint should not be disproportionate to the danger. Cases *supra* and *Freund, Police Power*, §§ 150, 158.

The ordinance is unreasonable because the law will not take cognizance of petty inconveniences and slight grievances. Cases *supra* and *Freund, Police Power*, § 178; *Joyee on Nuisances*, §§ 93, 96; *Van de Veer v. Kansas City*, 107 Missouri, 83; *Susquehanna Co. v. Spangler*, 86 Maryland, 562; *Tuttle v. Church*, 53 Fed. Rep. 422; *Gilbert v. Showerman*, 23 Michigan, 448; *McGuire v. Bloomingdale*, 29 N. Y. Supp. 580; *Gallagher v. Flury*, 99 Maryland, 181.

The ordinance is discriminatory and unreasonable because the district was, unreasonably and irrationally created. Cases *supra* and *Freund, Police Power*, § 179.

The police power cannot be used for the purpose of protecting property values. Cases *supra* and *Chicago v. Gunning System*, 214 Illinois, 62; Const. California, Art. 11, § 11; *Cooley, Const. Lim.* (7th ed.), 837.

The provision of the city charter (§ 2, sub. 22), giving the city general power to make and enforce peace and sanitary regulations is modified and limited by the specific power given (§ 2, sub. 13) to "restrain, suppress and pro-

hibit" certain named occupations. *Rodgers v. United States*, 185 U. S. 83; *In re Rouse*, 91 Fed. Rep. 96; *Crane v. Reeder*, 22 Michigan, 322; *Phillips v. Christian County*, 87 Ill. App. 481; *Felt v. Felt*, 19 Wisconsin, 193; *Nance v. Southern Ry.*, 149 N. Car. 366; *Hoey v. Gilroy*, 129 N. Y. 132; *Stockett v. Bird*, 18 Maryland, 484; *Nichols v. State*, 127 Indiana, 406; *State v. Hobe*, 106 Wisconsin, 411; *State v. Dinnesse*, 109 Missouri, 434; *Frandsen v. San Diego*, 101 California, 317.

The city having adopted the special and limited power set forth in the charter (§ 2, sub. 13), did not accept in its entirety the right to enforce the police power of the State as granted by § 11, art. XI of the constitution. *Rapp v. Kiel*, 159 California, 702, 709; *In re Pfahler*, 150 California, 71, 81; *People v. Newman*, 96 California, 605; *State v. Ferguson*, 33 N. H. 424; *Northwestern Tel. Co. v. St. Charles*, 154 Fed. Rep. 386; *Louis v. West. Un. Tel. Co.*, 149 U. S. 465.

The legislative body of a city having freeholders' charter may be limited by charter provision in the exercise of the police power conferred upon the city by the constitution of the State. Cases *supra*.

Mr. Albert Lee Stephens, Mr. Charles S. Burnell and Mr. Warren L. Williams for defendant in error:

For other ordinances prohibiting the maintenance of certain classes of business in residence districts see *Ex parte Queng Wo*, 161 California, 220; *Grumbach v. Leelande*, 154 California, 679; *In re Montgomery*, 163 California, 457; *In re Linehan*, 72 California, 114.

The police power extends to all the great public needs. *Canfield v. United States*, 167 U. S. 518; *Bacon v. Walker*, 204 U. S. 311, 317; *C., B. & Q. R. R. v. Drainage Commrs.*, 200 U. S. 592; *Noble State Bank v. Haskell*, 219 U. S. 104; *Lake Shore Rwy. v. Ohio*, 173 U. S. 285; *Thorpe v. Railway*, 27 Vermont, 140; *Pound v. Turck*, 96 U. S. 464; *Railroad*

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v. *Husen*, 96 U. S. 470; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389; *Bracey v. Darst*, 218 Fed. Rep. 98.

Under what circumstances the police power should be exercised to prohibit the conduct of certain classes of business within a certain district is a matter of police regulation for the municipal authorities. *New Orleans v. Murat*, 119 Louisiana, 1093; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703.

It is primarily for the legislative body clothed with the proper power, to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances and of the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation. Cases *supra* and *Krittenbrink v. Withnell*, 135 N. W. Rep. 376; *Odd Fellows Cemetery v. San Francisco*, 140 California, 226; *Laurel Hill Cemetery v. San Francisco*, 152 California, 464; *In re Smith*, 143 California, 370; *Ex parte Tuttle*, 91 California, 589, 591; *Mo. Pac. R. R. v. Omaha*, 235 U. S. 121.

The reasons actuating the legislative body in enacting the regulation need not necessarily appear from a reading of the ordinance itself. *Grumbach v. Lelande*, 154 California, 685; *In re Zhizhuzza*, 147 California, 328, 334.

The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil, and the exercise of the police power may and should have reference to the particular situation and needs of the community. *Ohio Co. v. Indiana*, 177 U. S. 190; *Clark v. Nash*, 198 U. S. 361; *Strickly v. Highland Co.*, 200 U. S. 527; *Offield v. N. Y. Co.*, 203 U. S. 372; *McLean v. Denver*, 203 U. S. 38; *Brown v. Walling*, 204 U. S. 320; *Bacon v. Walker*, 204 U. S. 311;

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Plessy v. Ferguson, 163 U. S. 537; *Welch v. Sweeney*, 23 L. R. A. (N. S.) 1160.

It is not necessary that a business be a nuisance *per se* to be regulated. *Ex parte Lacey*, 108 California, 326; *Moses v. United States*, 16 App. Cas. D. C. 428; *Rhodes v. Dunbar*, 57 Pa. St. 275; *Breadman v. Tredwell*, 31 Law Journal (N. S.), 873; *Bassham v. Hall*, 22 Law Times, 116; *Bumford v. Tumley*, 2 B. & S. (Q. B.) 62; *Campbell v. Seaman*, 63 N. Y. 568.

The question whether the classification of subjects for the exercise of police power is proper is not to be determined upon hard and fast rules, but must be answered after a consideration of the particular subject of litigation. *Ex parte Stollenberg*, 134 Pac. Rep. 971.

The length of time during which a business has existed in a certain locality does not make its prohibition for the future unconstitutional. *Tiedeman's Stat. and Fed. Control*; *Russell v. Beatty*, 16 Mo. App. 131; *Sedgwick's Stat. and Const. Law*, 434; *C., B. & Q. R. R. v. Drainage Commrs.*, 200 U. S. 592; *Freund on Police Power*, § 529; *Case of Morskettle*, 16 Mo. App. 8; *Powell v. Brookfield Brick Co.*, 78 S. W. Rep. 648; *Bushnell v. Robinson*, 62 Iowa, 542; *Baltimore v. Fairfield*, 87 Maryland, 352; *Harmison v. Lewiston*, 46 Ill. App. 164; *Commonwealth v. Upton*, 6 Gray, 473; *Rhodes v. Dunbar*, 57 Pa. St. 257; *People v. Detroit Lead Works*, 82 Michigan, 471.

Where the police power restricts constitutional rights, particularly as to property, the value of that property is not material to the issue. *Mugler v. Kansas*, 123 U. S. 623; *Grumbach v. Leland*, 145 California, 684; *Western Indemnity Co. v. Pillsbury*, 50 (No. 2654) Cal. Dec. 291; *Eric R. R. v. Williams*, 233 U. S. 685, 700.

The size of the territory affected by the ordinance is no criterion by which to be guided in judging of its discriminatory qualities. Cases *supra*.

That a statute will result in injury to some private

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interest does not deprive the legislature of power to enact it, although a statute may be invalid where its purpose is primarily the destruction of property. *Enos v. Hanff*, 152 N. W. Rep. 397.

The character and value of property contiguous to the business of plaintiff in error is very much to be considered. *Krittenbrink v. Withnell*, 135 N. W. Rep. 376.

That similar conditions exist in other localities is no reason why an ordinance regulating and equally affecting every one in a given locality should be declared unconstitutional.

A statute enacted within the police power will not be adjudged invalid merely because omitted cases might have been properly included in the statute. *People v. Schweinler*, 214 N. Y. 395; *Krohn v. Warden*, 152 N. Y. Supp. 1136; *State v. Olson*, 26 N. Dak. 304.

Every holder of property holds it under the implied liability that its use may be so regulated that it shall not encroach injuriously on the enjoyment of property by others or be injurious to the community. *Pittsburg Ry. v. Chappell*, 106 N. E. Rep. (Ind.) 403.

People residing in cities are entitled to enjoy their homes free from the damaging results of smoke, soot, and cinders, if sufficient to depreciate the value of their property and render its occupancy uncomfortable. *King v. Vicksburg Ry.*, 88 Mississippi, 456; *Rochester v. Macauley-Fien Co.*, 199 N. Y. 207.

Brick yards and brick manufacturing plants, as well as all businesses which require the generation of smoke, soot, and gas, have universally been held to be objectionable and may be enjoined or regulated. Cases *supra* and *Booth v. Nome R. R.*, 37 Am. St. Rep. 552, 558; *McMorran v. Fitzgerald*, 106 Michigan, 649; *King v. Vicksburg Ry.*, 117 Am. St. Rep. 749; *Rochester v. Macauley-Fien Co.*, 199 N. Y. 207.

It is immaterial whether injury from gases emitted from

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brick kilns is only occasional. Cases *supra* and *Kirchgraber v. Lloyd*, 59 Mo. App. 59.

The presumption is in favor of the validity of the ordinance and this presumption has not been rebutted by any evidence produced by plaintiff in error.

Prohibition of industries in certain sections of cities is but a regulation, and is always so treated. *Ex parte Byrd*, 54 Alabama, 17; *In re Wilson*, 32 Minnesota, 145; *Shea v. Muncie*, 148 Indiana, 14; *Cronin v. People*, 82 N. Y. 318; *Newton v. Joyce*, 166 Massachusetts, 83; *Little Rock v. Rineman*, 155 S. W. Rep. 105; *St. Louis v. Russell*, 116 Missouri, 248; *Ex parte Botts*, 154 S. W. Rep. 221.

The city has the right to regulate an occupation by confining the conducting thereof within prescribed limits. Cases *supra*; *Grumbach v. Lelande*, 154 California, 679; *In re Linehan*, 72 California, 114; *White v. Bracelin*, 144 Michigan, 332; 107 N. W. Rep. 1055; *Stram v. Galesburg*, 203 Illinois, 234; 67 N. E. Rep. 836; *New Orleans v. Murat*, 119 Louisiana, 1093; 44 So. Rep. 898; *Ex parte Botts*, 154 S. W. Rep. 221.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Habeas corpus prosecuted in the Supreme Court of the State of California for the discharge of plaintiff in error from the custody of defendant in error, Chief of Police of the City of Los Angeles.

Plaintiff in error, to whom we shall refer as petitioner, was convicted of a misdemeanor for the violation of an ordinance of the City of Los Angeles which makes it unlawful for any person to establish or operate a brick yard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick within described limits in the city. Sentence was pronounced against him

and he was committed to the custody of defendant in error as Chief of Police of the City of Los Angeles.

Being so in custody he filed a petition in the Supreme Court of the State for a writ of *habeas corpus*. The writ was issued. Subsequently defendant in error made a return thereto supported by affidavits, to which petitioner made sworn reply. The court rendered judgment discharging the writ and remanding petitioner to custody. The Chief Justice of the court then granted this writ of error.

The petition sets forth the reason for resorting to *habeas corpus* and that petitioner is the owner of a tract of land within the limits described in the ordinance upon which tract of land there is a very valuable bed of clay, of great value for the manufacture of brick of a fine quality, worth to him not less than \$100,000 per acre or about \$800,000 for the entire tract for brick-making purposes, and not exceeding \$60,000 for residential purposes or for any purpose other than the manufacture of brick. That he has made excavations of considerable depth and covering a very large area of the property and that on account thereof the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was at the time of purchase outside of the limits of the city and distant from dwellings and other habitations and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.

That if the ordinance be declared valid he will be compelled to entirely abandon his business and will be deprived of the use of his property.

That the manufacture of brick must necessarily be carried on where suitable clay is found and the clay cannot be transported to some other location, and, besides, the clay upon his property is particularly fine and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is one other brick yard besides that of plaintiff in error.

That there is no reason for the prohibition of the business; that its maintenance cannot be and is not in the nature of a nuisance as defined in § 3479 of the Civil Code of the State, and cannot be dangerous or detrimental to health or the morals or safety or peace or welfare or convenience of the people of the district or city.

That the business is so conducted as not to be in any way or degree a nuisance; no noises arise therefrom, and no noxious odors, and that by the use of certain means (which are described) provided and the situation of the brick yard an extremely small amount of smoke is emitted from any kiln and what is emitted is so dissipated that it is not a nuisance nor in any manner detrimental to health or comfort. That during the seven years which the brick yard has been conducted no complaint has been made of it, and no attempt has ever been made to regulate it.

That the city embraces 107.62 square miles in area and 75% of it is devoted to residential purposes; that the district described in the ordinance includes only about three square miles, is sparsely settled and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brick yard.

That there are and were at the time of the adoption of the ordinance in other districts of the city thickly built up with residences brick yards maintained more detrimental to the inhabitants of the city. That a petition was filed,

signed by several hundred persons, representing such brick yards to be a nuisance and no ordinance or regulation was passed in regard to such petition and the brick yards are operated without hindrance or molestation. That other brick yards are permitted to be maintained without prohibition or regulation.

That no ordinance or regulation of any kind has been passed at any time regulating or attempting to regulate brick yards or inquiry made whether they could be maintained without being a nuisance or detrimental to health.

That the ordinance does not state a public offense and is in violation of the constitution of the State and the Fourteenth Amendment to the Constitution of the United States.

That the business of petitioner is a lawful one, none of the materials used in it are combustible, the machinery is of the most approved pattern and its conduct will not create a nuisance.

There is an allegation that the ordinance if enforced fosters and will foster a monopoly and protects and will protect other persons engaged in the manufacture of brick in the city, and discriminates and will discriminate against petitioner in favor of such other persons who are his competitors, and will prevent him from entering into competition with them.

The petition, after almost every paragraph, charges a deprivation of property, the taking of property without compensation, and that the ordinance is in consequence invalid.

We have given this outline of the petition as it presents petitioner's contentions, with the circumstances (which we deem most material) that give color and emphasis to them.

But there are substantial traverses made by the return to the writ, among others, a denial of the charge that the ordinance was arbitrarily directed against the business of

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petitioner, and it is alleged that there is another district in which brick yards are prohibited.

There was a denial of the allegations that the brick yard was conducted or could be conducted sanitarily or was not offensive to health. And there were affidavits supporting the denials. In these it was alleged that the fumes, gases, smoke, soot, steam and dust arising from petitioner's brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity.

There was no specific denial of the value of the property or that it contained deposits of clay or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would "entirely deprive petitioner of his property and the use thereof."

How the Supreme Court dealt with the allegations, denials and affidavits we can gather from its opinion. The court said, through Mr. Justice Sloss, 165 California, p. 416: "The district to which the prohibition was applied contains about three square miles. The petitioner is the owner of a tract of land, containing eight acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was directed had been annexed to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period of his ownership, used the land for brickmaking, and has erected thereon kilns, machinery and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose."

The court considered the business one which could be regulated and that regulation was not precluded by the fact "that the value of investments made in the business prior to any legislative action will be greatly diminished," and that no complaint could be based upon the fact that

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petitioner had been carrying on the trade in that locality for a long period.

And, considering the allegations of the petition, the denials of the return and the evidence of the affidavits, the court said that the latter tended to show that the district created had become primarily a residential section and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner; and that such evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination, overcame the contention that the prohibition of the ordinance was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business was so detrimental to the interests of others as to require suppression."

The court, on the evidence, rejected the contention that the ordinance was not in good faith enacted as a police measure and that it was intended to discriminate against petitioner or that it was actuated by any motive of injuring him as an individual.

The charge of discrimination between localities was not sustained. The court expressed the view that the determination of prohibition was for the legislature and that the court, without regard to the fact shown in the return that there was another district in which brick-making was prohibited, could not sustain the claim that the ordinance was not enacted in good faith but was designed to discriminate against petitioner and the other brick yard within the district. "The facts before us," the court finally said, "would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what it purported to be, viz., a legitimate regulation, operating alike upon all who came within its terms."

We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many

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cases cited by petitioner in which it is decided that the police power of a state cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

The police power and to what extent it may be exerted we have recently illustrated in *Reinman v. Little Rock*, 237 U. S. 171. The circumstances of the case were very much like those of the case at bar and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance *per se* cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in

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particulars, but they are alike in that which cause and justify prohibition in defined localities—that is, the effect upon the health and comfort of the community.

The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: granting that the business was not a nuisance *per se*, it was clearly within the police power of the State to regulate it, “and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law.” And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination. There was a citation of cases. We think the present case is within the ruling thus declared.

There is a distinction between *Reinman v. Little Rock* and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found and that the clay on petitioner's property cannot be transported to some other locality. This is not urged as a physical impossibility but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive “from a financial standpoint.” But upon the evidence the Supreme Court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brick yard and not from the deprivation of the deposits of clay, and distinguished *Ex parte Kelso*, 147 California, 609, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco.

The court there said that the effect of the ordinance was "to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership,—viz., the right to extract therefrom such rock and stone as they might find it to their advantage to dispose of." The court expressed the view that the removal could be regulated but that "an absolute prohibition of such removal under the circumstances," could not be upheld.

In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.

Petitioner invokes the equal protection clause of the Constitution and charges that it is violated in that the ordinance (1) "prohibits him from manufacturing brick upon his property while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of plaintiff in error"; and (2) that it "prohibits the conduct of his business while it permits the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted."

If we should grant that the first specification shows a violation of classification, that is, a distinction between businesses which was not within the legislative power, petitioner's contention encounters the objection that it depends upon an inquiry of fact which the record does not enable us to determine. It is alleged in the return to the petition that brickmaking is prohibited in one other district and an ordinanee is referred to regulating business in other districts. To this plaintiff in error replied that the ordinance attempts to prohibit the operation of certain

businesses having mechanical power and does not prohibit the maintenance of any business or the operation of any machine that is operated by animal power. In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action exercised upon matters of which the city has control.

To a certain extent the latter comment may be applied to other contentions, and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other brickmakers. The charge and argument are too illusive. It is part of the charge that the ordinance was directed against him. The charge, we have seen, was rejected by the Supreme Court, and we find nothing to justify it.

It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the Supreme Court of the State, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.

There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does

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not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.

We do not notice the contention that the ordinance is not within the city's charter powers nor that it is in violation of the state constitution, such contentions raising only local questions which must be deemed to have been decided adversely to petitioner by the Supreme Court of the State.

Judgment affirmed.
